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Lincoln's Inn.
978 6 1687
237

# REPORTS OF CASES

ADJUDGED IN THE

# HIGH COURT OF CHANCERY,

BY

THE VICE-CHANCELLOR SIR JOHN STUART.

BY

JOHN SMALE,
(OF LINCOLN'S INN,)
AND
J. W. DE LONGUEVILLE GIFFARD,
(OF THE INNER TEMPLE,)
ESQUIRES, BARRISTERS AT LAW.

VOL. II.

MICHAELMAS TERM, 16 VICT., TO THE END OF MICHAELMAS VACATION, 17 VICT.

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1855.

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LORD CRANWORTH, . . . . . *Lord Chancellor.*

SIR JOHN ROMILLY, . . . . . *Master of the Rolls.*

SIR JAMES LEWIS KNIGHT BRUCE, . } *Lords Justices.*
SIR GEORGE JAMES TURNER, . . }

SIR RICHARD TORIN KINDERSLEY, . } *Vice-Chancellors.*
SIR JOHN STUART, . . . . } *Vice-Chancellors.*
SIR WILLIAM PAGE WOOD, . . } *Vice-Chancellors.*

SIR ALEXANDER JAMES EDMUND COCKBURN, *Attorney-General.*

SIR RICHARD BETHELL, . . . . *Solicitor-General.*

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# APPENDIX.

## Cases on Chancery Procedure,

DECIDED BY

SIR JOHN STUART, VICE-CHANCELLOR:

COMMENCING IN

HILARY TERM, 17 VICT.

1854.

THORP *v.* OWEN. *Feb. 10th.*

The Court, having ordered certain small leaseholds to be sold and the proceeds distributed, together with a fund in Court, among numerous parties upon the certificate of the Chief Clerk, in order to save expense, directed the purchasers to be served with a summons to shew cause at Chambers why the proceeds should not be distributed pursuant to the order; and no cause having been shewn, the proceeds were distributed by the Chief Clerk.

IN this case there was a fund in Court, which was divisible among a numerous class of persons, and was directed to be distributed among the parties entitled upon the certificate of the Chief Clerk. There were also some leaseholds, to which the same persons were entitled, of the value of about 300*l.*, which were directed to be sold, and the proceeds to be apportioned in the same way as the fund, in order to save the expense of a second application to the Court.

The Registrar objected to draw up the order, on the ground that, by the practice, the purchase money, when paid in by the purchasers, would be ordered not to be paid out without notice to the purchasers, which order would, in effect, operate as a stop order.

With a view to obviate the difficulty, the Court inserted a special direction, that the proceeds of the leaseholds, when sold, should be distributed upon the Chief Clerk's certificate; but that, before the distribution was made, the purchasers should be served with a summons, to shew cause why the purchase moneys should not be distributed as in the order mentioned. No such cause hav-

1854.
THORP
v.
OWEN.

ing been shewn, and the conveyances having been delivered to the purchaser, the fund was distributed.

Mr. *Bacon* and Mr. *J. W. Smith* appeared for the petition.

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LEATHERT *v.* THORNE.

*Feb. 25th.* A SIMILAR order was made in this case.

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*Feb. 24th.*

HEWETSON *v.* TODHUNTER.

It is not enough, to identify a a document, that it should be inseparably connected with, and referred to as so connected in, the affidavit. The document must be impressed with some mark to which the affidavit refers.

MR. *C. T. SIMPSON* applied to the Court for leave to file an affidavit, sworn before the British Consul in Philadelphia, for the purpose of proving that a paper writing annexed was the true copy of a deed.

The affidavit stated that "the paper writing annexed thereto was a true copy of the deed."

The papers were connected by a ribbon, passed through a slit in the documents, both ends of which were united under the Consular seal.

There was no mark upon the alleged copy by way of identification; and the Clerk of Records and Writs refused to file the affidavit.

It was submitted, that, as the affidavit stated that the paper writing annexed to the affidavit, and to the Consular certificate, was the copy of the deed, and was inseparably connected therewith by means of the ribbon, there was a sufficient identification.

The VICE-CHANCELLOR thought the objection of the Clerk well founded, and considered the settled practice to be, that, in order to identify the exhibit, it must be authenticated as the document referred to in the affidavit.

1854.

*Feb.* 24*th.*

EMPSON *v.* BOWLEY.

The time within which the interrogatories ought to be delivered under the 17th Order of 7th August, 1852, having expired, the Court, under the 20th Order, upon a motion, of which notice was given, enlarged the time within which such interrogatories should be delivered.

MR. *FABER* moved to enlarge the time for serving interrogatories upon the defendants for eight days from the service of the order. By the 16th Order, of the 7th of August, 1852, the interrogatories are required to be filed within eight days after the time limited for the appearance of such defendant. And by the 17th Order, in case the defendant or defendants appear within the time limited, a copy of the interrogatories so filed is required to be delivered within eight days after the time allowed for such appearance.

In this case, a bill was filed on the 3rd of December, 1853, and an appearance entered by the defendants on the 13th. On the 15th the interrogatories were filed; and on the following day a copy thereof was put through the aperture in the door of the chambers, in Clement's Inn, where the defendant's solicitor carried on business. The defendant had not put in an answer; and on the application by the plaintiff for an attachment, the mode of service was held defective.

There was no Order which, in terms, authorised the Court to enlarge the time fixed by the 17th Order; but, by the 46th Order (*a*), the power of the Court as to time was retained.

His HONOUR made the order.

It appearing that no notice of the application had been given to the defendants, the Registrar objected that the order ought to have been obtained on notice.

Mr. *Faber*, on the 2nd of March, renewed the application, and called his Honour's attention to the 20th Order (*b*), of 7th of Au-

(*a*) The 46th Order is as follows:—The power of the Court to enlarge or abridge the time for doing any act, or taking any proceedings in any cause or matter, upon such, if any, terms as the justice of the case requires, is unaffected by these Orders.

(*b*) 20th Order—After the time allowed by Order 16 for filing interrogatories for the examination of any defendant, no interrogatories are to be filed for the examination of such defendant without special leave of the Court, to be applied for upon notice of motion.

1854.

EMPSON v. BOWLEY.

gust, 1852, as to filing interrogatories. He cited also a case of *Wilmer* v. *James*, decided by Sir *W. Page Wood*.

The VICE-CHANCELLOR said this application was within the spirit of the 20th Order, and that notice of the application was necessary.

*March 28th.*

SCHWABACHER *v.* BECKER.

On a motion that a fund standing to the separate account of a married woman, a foreigner, domiciled abroad, should be paid to her husband, upon affidavit that there was no settlement, and that, by the law of the country where the parties were domiciled, the husband was entitled to the fund, the Court refused to make the order without the consent of the wife, taken by commission or on examination.

MR. *SANDYS* moved that a sum of 2623*l.* 11*s.* 11*d.* which, in an administration suit, had been carried to the separate account of a married lady, Mrs. Lampe, a German, domiciled with her husband at Frankfort-on-the-Main, should be paid to her husband.

An affidavit was produced, to the effect that no settlement had been executed on the marriage of Mrs. Lampe; and also an affidavit of a professor of law in Frankfort, that, in the absence of a settlement, the husband, according to the law in force in Frankfort, was entitled to the fund.

His HONOUR said, he was very unwilling to put the parties to any unnecessary expense or delay; but it was not the practice of this Court to pay to the husband money accruing to the wife exceeding the sum of 200*l.*, without formal proof of the wife's consent. The evidence only shewed, that the rights of the husband, according to the law of Frankfort, were the same as the rights of the husband according to the law of England. The wife's equity to a settlement was an indulgence allowed by the practice of this Court, in derogation of the legal rights of the husband. The evidence of the legal rights of the husband, according to the country of the domicil, had nothing to do with the question. He must, therefore, refuse to make the order.

1854.

*April 24th.*

In the Matter of the TRUSTS of the Will of DAVID BAXTER.

A trustee having refused to convey certain shares to new trustees duly appointed, a notice was served upon him under the 24th section of the Trustee Act, 1850; and, on a petition being afterwards presented, which was not served on the recusant trustee, the Court made a vesting order.

THIS was the petition of Richard Oxtaby and Joseph Gordon, trustees, and of the parties beneficially entitled under the will of David Baxter, deceased; and it prayed that twenty shares in the capital and stock of the Yorkshire Fire and Life Assurance Company, now vested in Richard Oxtaby and Baxter Barber, might, by the order of the Court, be vested in the said Richard Oxtaby and Joseph Gordon, jointly, upon the trusts of the will.

By the will of the testator, dated in October, 1850, the twenty shares were given to Richard Oxtaby and Baxter Barber on certain trusts, and after his death were duly transferred to the trustees named in the will. In November, 1852, Baxter Barber, being desirous of retiring from the trust, a deed was executed appointing Joseph Gordon trustee in the place of B. Barber.

The new trustees then applied to B. Barber to transfer to them the twenty shares, according to the rules of the Insurance Company, which, however, he refused to do. A notice was then served upon him under the 24th section of the Act of 1850, and this petition was shortly afterwards presented. An order similar to that now asked had been made in *Ex parte Russell* (*a*). The former trustee had not been served, because, under former Trustee Acts (*b*), it was not necessary: *Ex parte Armstrong* v. *Shallcross* (*c*).

His HONOUR said, that, on the authority of *Ex parte Russell*, he should make the order.

(*a*) 1 Sim., N. S., 404. (*b*) 10 Geo. 4, c. 56; 11 Geo. 4 & 1 Will. 4, c. 60. (*c*) 16 Sim. 296.

1854.

*April 24th.*

In the Matter of the SETTLED ESTATES of Sir G. WEBSTER, Deceased,

The SOUTH EASTERN RAILWAY ACT,

AND

The LANDS CLAUSES CONSOLIDATION ACT.

A petition by the tenant for life, of a fund paid into Court by a Railway Company, praying for the investment of the fund, and payment of the dividends to the petitioner; certain persons, entitled to a charge on the real estate, in respect of which the fund was paid, being served with the petition and appearing, the Court refused to direct the Railway Company to pay their costs.

THIS was the petition of Sir Godfrey Webster, Bart., that the sum of 408*l.* 7*s.* 10*d.*, standing in Court to his account to the credit of the South Eastern Railway Company, might be invested and carried over to an account intituled "Ex parte The South Eastern Railway Company, to the account of the Settled Estates of Sir Godfrey Webster, Bart.;" and that the dividends to accrue thereon might be paid to the petitioner for his life, or until further order; and that the Company might be ordered to pay the petitioner, and all other parties, the costs of the petition.

By a settlement on the marriage of the late Sir Godfrey Webster, dated 20th of August, 1814, a jointure of 1000*l.* a year was charged on the Battel Abbey estates for his then intended wife. By a deed, dated the 22nd of November, 1820, the estates were re-settled and conveyed to trustees, including the manor of Battel, upon certain trusts, subject to the said jointure. The deed contained a power enabling the tenant for life to jointure to the extent of 500*l.*

By a deed, dated the 9th of July, 1851, on the marriage of the eldest son of the above-named Sir Godfrey, a settlement was executed, by which the said hereditaments were charged with a jointure for the intended wife.

On the 25th of March, 1848, Dame Charlotte Webster assigned her jointure to the Solicitors and General Life Assurance Society, by way of mortgage; by whom it was, on the 24th of December, 1850, assigned to the Monarch Fire and Life Assurance Company.

The South Eastern Railway Company, having taken various parcels of copyhold land for their railway, by a deed, dated the 24th of February, 1854, caused the same to be enfranchised by Sir Godfrey Webster, the lord of the manor, and paid the amount of 408*l.* 7*s.* 10*d.* into Court.

This petition was presented by Sir G. Webster, and was served by him upon Dame Charlotte Webster and the Monarch Life Assurance Company.

1854.

*In re* SETTLED ESTATES OF WEBSTER.

Mr. *Schomberg* appeared for the petitioner, and asked that the fund might be invested, and the dividends paid to Sir Godfrey Webster.

Mr. *Welford* appeared for the Monarch Assurance Company, and asked for the costs of appearing on the petition. The mortgagees were entitled to see that the security which they had was not diminished.

Mr. *Simpson*, for the company, objected to paying more than one set of costs; the appearance of the mortgagees or of Lady Webster was quite unnecessary.

His HONOUR said, he thought the company ought only to pay one set of costs; and made an order to that effect.

---

DALE *v.* HAYES. *April 27th.*

Where Bank Stock is transferred to the Accountant-General, with a direction to pay the dividends to the tenant for life only, a per-centage off the dividends is deducted, unless otherwise ordered by the Court.

BY a decree of his Honour, dated the 11th of February, 1854, his Honour declared the rights of the legatees under the will of Christopher Daniel Hayes, deceased, and directed that certain sums of Bank Stock should be transferred into the name of the Accountant-General, with a direction that the dividends should be paid to the tenant for life.

Mr. *Amphlett* now moved that this case be included among the excepted cases, or, by reason of an order of Lord *Eldon*, the Accountant-General would only pay to the tenants for life a per-centage amount(*a*).

His HONOUR made the order.

(*a*) The practice originated *tempore* Lord *Eldon*, but the order is now made by each Chancellor on succeeding to office.

1854.

*June* 1*st.*

In a bill filed by a married woman to administer the estate of a testator, and to establish her equity to a settlement, to which her husband and his assignees in bankruptcy were made defendants, the Court *held* the husband was entitled to his costs, but refused to give the assignees their costs.

ROTHERHAM *v.* BATTSON.

THE bill was filed by a married woman, to administer the estate of a testator, and it prayed, that the property given to her under the will might be settled upon the plaintiff and her children. The bill was filed against the executor of the testator, and against the husband of the plaintiff and his assignees in bankruptcy.

It appeared that Henry Rotherham, the husband, was a debtor to the estate in a sum of 400*l.* He subsequently became bankrupt, and assignees were appointed under the commission.

Mr. *Bacon* and Mr. *Hislop Clarke* appeared for the plaintiff.

Mr. *Wigram* and Mr. *Tapping* appeared for the executor, and contended, that, the plaintiff's husband being a debtor to the estate, the amount of his debt should be deducted from the share of the wife in the residuary estate of the testator; at all events, the Court would not give the husband his costs, which would in effect be giving him two sets of costs.

Mr. *De Longueville Giffard*, for the assignees, claimed to have a moiety of the fund, or at least such portion as the Court should think fit, paid to the assignees.

The VICE-CHANCELLOR said, that, as the husband had, it appeared, received a portion of the estate in which his wife was interested, he should direct a settlement to be made of the whole of her share; and as the husband was a debtor to the estate, he should give no costs to his assignees. With regard to the costs of the husband, his Honour said, that, as by a rule of the Court the plaintiff could not associate her husband with herself as co-plaintiff, he was necessarily made a defendant. Then, it was contended, that, the husband being a debtor to the estate, he ought not to be allowed his costs, or at least that he ought to be allowed only to deduct them from his debt. But the husband was before the Court only in his character of husband, and not as debtor. It was the duty of his assignees to answer all demands on which the husband was originally liable, and his whole estate was vested in them. He thought, therefore, that the husband was entitled to his costs.

# REPORTS OF CASES,

ARGUED AND DETERMINED

IN THE

# High Court of Chancery,

COMMENCING IN

MICHAELMAS TERM, 17 VICT. 1853.

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1853.
*Nov.* 25*th*,
*Dec.* 1*st*;
1854.
*Jan.* 17*th*.

IN THE MATTER OF THE DOVER, HASTINGS, AND BRIGHTON JUNCTION RAILWAY COMPANY, AND THE JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 AND 1849.

THE CASE OF CAREW AND OTHERS.

The subscribers' agreement of a provisionally registered joint-stock company, being by indenture tripartite, and containing a covenant by the allottees of shares,

IN this case, Messrs. George Carew, William Cridland, John Snaith Rymer, and William Henry Rymer, had given a notice of motion, dated the 4th of July, 1853, to the official manager, that an order of Master *Senior*, whereby he had directed a call of 1*l.* per share to be made on all the contributories of the company, whose names were in-

who were named as parties of the first part, to indemnify the managing directors, who were all particularly named or described as parties of the third, the deed being only executed by the parties of the first part, and never executed by any of the covenantees, who were the parties of the third part, and the company never having been formed:—*Held*, that the deed was not operative as a covenant of indemnity in favour of the parties who never executed the deed, and who never acquired the character in respect of which they were made covenantees.

On proceedings under an order to wind up a company under the Winding-up Acts of 1848 and 1849, it appearing that the company had only been provisionally registered, and never had been formed; and it also appearing that neither allottees of shares who had executed the subscribers' agreement, nor those who had taken a part in the project as members of a provisional committee or committee of management, had ever been so associated as to be liable on any joint undertaking,—the proceedings under the order to wind-up were wholly stayed.

An indenture of covenant containing stipulations both on the part of the covenantor and the covenantee, executed by the covenantor and not by the covenantee, who declines to execute it, and never acquired the character in respect of which he is made a party as covenantee, cannot be enforced by him against the covenantor.

1853.

*In re* DOVER, HASTINGS, AND BRIGHTON JUNCTION RAILWAY CO. &c.

CAREW'S CASE.

*Statement.*

cluded in the list of contributories as allottees of shares, who agreed to accept shares on the terms of the prospectus, and had paid the deposits, and signed the deeds in respect of the shares allotted to them, and whereby he directed each of such contributories, on the 15th of July, 1853, to pay to the official manager of the Company the balance, if any, which would be due from him after debiting his account in the Company's books with such call, might be discharged or varied; or otherwise that they, the appellants, might be at liberty to appeal from the Master's settlement of the list of contributories, whereby they were included as contributories; or that the Court might declare who were the persons liable as contributories to pay the debts of the Company, and the expenses attending its winding-up, and in what proportion such persons were liable.

The motion came on for argument on the 25th of November last, when, after hearing counsel in support of the motion, and for the official manager—

The VICE-CHANCELLOR said, he thought that in this case it was his duty to endeavour, on a full investigation, to make such a declaration of the liabilities of all the parties as might enable the Master, by acting on his declaration, forthwith to wind up the affairs of the Company.

His Honour then gave Mr. Carew and his co-appellants leave to appeal against their names remaining on the list of contributories, to be served on all persons interested in the matter of the winding-up.

The appellants thereupon gave a notice of motion, dated the 26th of November, 1853, that they should move that their names might be struck off the list of contributories as settled by the Master.

The several persons, or such of them as could be found, constituting the managing committee, and the other persons in England, whose names were upon the Master's list of contributories, were served with notice of this motion.

Mr. Cory, a member of the managing committee, on

1853.

*In re* DOVER, HASTINGS, AND BRIGHTON JUNCTION RAILWAY CO. &c.

CAREW'S CASE.

*Statement.*

*Dec.* 1*st.*

whose petition the order for winding-up the company had been made, was one of the committee thus served.

Sir Robert Price, another member of the committee, had compromised the claims of the Company upon him as a contributory with the official manager, with the approbation of the Master, on payment of 100*l.*; he also was served with notice.

Both motions, viz. that on the notice dated the 4th of July, 1853, and that on the notice dated the 26th of November, 1853, now came on together to be heard.

The following short statement of the circumstances will be sufficient to shew generally the nature of the case.

A railway was projected to be made by a company, to be called the Dover, Hastings, and Brighton Junction Railway Company. This project was provisionally registered in September, 1845. The prospectus of the projected company was issued on the 14th of October in the same year, announcing that the capital was to consist of 300,000*l.*, in shares of 20*l.* each, with a deposit of 2*l.* 2*s.* per share. A number of provisional directors were named in this prospectus, one of whom was Mr. Frewen.

An indenture, called the subscribers' agreement, was prepared and engrossed early in October.

This indenture purported to be made between the subscribers who executed that indenture, being severally subscribers to the undertaking, of the first part; the trustees, of the second part; and fifteen persons therein named (one of whom was Mr. Frewen) as managing directors, of the third part, and who were therein further described as "being some of the parties hereto of the first part."

This indenture contained the stipulations usual in such deeds; and, among other clauses, a covenant by the parties thereto of the first part, with the parties thereto of the third part, in the following terms:—

"The parties hereto of the first part shall and will save,

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defend, keep harmless, and indemnify the said managing directors, and each and every member thereof, of and from all payments, loss or losses, costs, charges, damages, and expenses, which such managing directors or any member thereof have or hath already incurred or become liable to in or in reference to the formation of the said intended railway, or the establishment of the company, before or since the provisional registration thereof, or shall or may incur, bear, pay, sustain, become liable for, or be put unto in the exercise and execution of the powers and authorities hereby vested in them or him as such managing directors or director; and that the several sums of money so deposited as aforesaid, or hereafter to be deposited by the parties hereto of the first part, in respect or on account of the respective shares of the parties hereto of the first part in the said company, shall be charged and chargeable with such payments, losses, costs, charges, damages, and expenses; and the managing directors for the time being of the said company shall be at liberty to apply all or any portion of such sums of money in payment and discharge of such sums, losses, costs, charges, damages, and expenses."

This deed was never executed by the trustees or by any of the persons named as parties of the third part.

On the 11th of October, Mr. Frewen had been requested by one of the solicitors of the projected company to execute it; but he refused, and desired that his name might be struck off the list of managing directors, stating, that, although he was favourable to the scheme, he had taken and would take no part in its affairs. Notwithstanding this, the name of Mr. Frewen was retained in the deed, which was signed and sealed by nineteen subscribers between the 22nd of October and the 4th of November. The aggregate number of shares in respect of which the names of these nineteen subscribers were affixed was 450, subscribing to the amount of 9200*l.*, on account of which 715*l.* was paid up as deposits, as required by the terms of the deed.

This sum was paid by the subscribers who executed the deed to the account of the managing committee of directors with their bankers, and it had been all drawn out by cheques signed by members of the managing committee.

Early in December the project was abandoned.

Mr. Cory, one of the managing committee, having been sued by the secretary and surveyor, and having been compelled to pay their demands, presented a petition for the winding-up of the company; and an order for that purpose was made on Mr. Cory's petition, on the 6th of August, 1849.

The Master, in 1851, settled certain persons as members upon the list of contributories, including the managing committee and also the subscribers who had executed the subscribers' agreement.

An attempt was made before the Master to fix Mr. Frewen as a contributory, but it failed; and his name was struck off the list.

On the 7th of June, 1853, an application was made to Master *Senior* for a call on the managing committee; but, the persons who had executed the subscribers' agreement not having been served, the hearing was adjourned, and a notice was served "on the parties who had executed the deed" for their attendance on the 24th of June. On that day, it was contended on behalf of the managing committee, that they were not liable to any call, and that the calls to pay the debts ought to be made exclusively on the persons who had executed the subscribers' agreement containing the covenant to indemnify the managing committee. After the question had been argued by counsel, the Master declared, that the persons who had paid their subscriptions, and executed the deed containing the covenant to indemnify the managing directors, were bound by that covenant, and were alone liable to a call; and he accordingly made the call upon them, and not on the contributories who were on the managing committee. The present appeal was presented against the order for this call.

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Mr. *Malins*, Mr. *Chandless*, Mr. *Chichester*, Mr. *Terrell*, and Mr. *Dickinson* appeared in support of the motions.—They submitted that Mr. Carew and his co-appellants, so far as they were allottees of shares, were not liable as contributories, on the authority of *Bright* v. *Hutton*, decided by the House of Lords (*a*). But it was said, that they had also executed the subscribers' agreement, which made them liable. But they had executed that deed under a fraudulent representation, that Mr. Frewen, a gentleman of great respectability, was a member of the managing committee, after he had expressly repudiated that character; and therefore the execution of the deed could not bind them. However, they insisted, that, inasmuch as none of the managing committee had paid anything in respect of shares, or executed the deed as the covenantees and as incurring liabilities under it, Mr. Carew and his co-appellants were not to be considered as being bound by the deed, even if they had executed it without any fraudulent representation to them.

Mr. *Roxburgh* appeared for the official manager.—He said, that, as the parties really interested were before the Court, he would submit the case to the Court, trusting that it would protect the official manager as one of its officers.

Mr. *Daniel*, Mr. *Selwyn*, Mr. *Lewin*, and Mr. *W. W. Mackeson*, for members of the managing committee, submitted that Mr. Carew and his co-appellants were bound by the deed under which, and in consequence of which, they had received scrip, which might have been sold at a profit. This was the advantage which they gained by executing the deed, and, in consideration of that advantage, they covenanted to indemnify the managing committee; and the managing committee were, by that deed, constituted the mere agents of the allottees for managing the project upon their undertaking to indemnify them.

(*a*) 3 H. L. Cas. 341.

Mr. *H. Stevens* appeared for Mr. Cory, on whose petition the order to wind up the Company had been obtained.

Mr. *Charles Hall* appeared for Sir Robert Price, who desired to adhere to the compromise, which, he submitted, was binding on all parties.

[The following cases were cited in the course of the argument: *Peto* v. *Peto* (*a*), *Evans* v. *Edwards* (*b*), *Ex parte Lucy* (*c*), *Berkeley* v. *Hardy* (*d*), *Hutton* v. *Upfill* (*e*), *Ex parte Maudslay* (*f*), *Ex parte Holroyd* (*g*), *Re Madrid and Valencia Railway Company Ex parte James* (*h*), *Lord Mansfield's case* (*i*).]

The Vice-Chancellor, stopping Mr. *Malins* in reply, said, that as there were classes of contributories who had paid nothing, it appeared to him that those classes ought, at least, to contribute to an amount rateably with the persons who had executed the deed and paid the amount due from them under it. The managing committee should contribute according to their liability; and then the allottees should contribute pari passu with them and the other contributories. The question remained, on what principle the managing committee should contribute. He at that time thought that the measure of their liability was in respect of forty shares each, which was the number of shares fixed to qualify them for their office.

He should, however, maturely consider what general declaration the Court could make; and he should, at a future day, give judgment, and state the grounds of his determination at length.

The additional facts and circumstances of this case will appear from the judgment.

(*a*) 16 Sim. 590.
(*b*) 22 L. J., C. B., 211.
(*c*) 17 Jur. 1143.
(*d*) 5 B. & C. 355.
(*e*) 6 Railw. Cas. 338; *S. C.*, 2 H. L. Cas. 674.
(*f*) 6 Railw. Cas. 350.
(*g*) 15 Jur. 696.
(*h*) 3 De G. & S. 127.
(*i*) 3 Id. 58.

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The VICE-CHANCELLOR now gave the following judgment:—

The question principally argued on these motions has been the liability of Mr. Carew and the other persons who executed the deeds called the subscribers' agreement and the parliamentary contract, and who paid the deposits in respect of the shares allotted to them. The Master is said to have decided, that these persons, by executing the subscribers' agreement, are bound by the covenant therein contained to indemnify the petitioner Mr. Cory, and are to pay and contribute on that footing. It does not seem to me necessary to enter into the question, so much argued in support of the motions, as to the alleged fraud and misrepresentation in procuring the execution of the subscribers' agreement. The incompleteness of that instrument, and the total failure of the purpose for which its execution was obtained, make it impossible for me to hold that it has any operation as a covenant to indemnify. There is a total failure of the mutuality of contract, which ought to be of the essence of the instrument. It never was executed by the persons named as parties to it of the second and third parts; and not only was never so executed, but some of the persons named as parties of the third part were so named without any sufficient authority, without their knowledge, and in one instance—that of Mr. Frewen—he expressly refused. Those persons who executed this instrument, and who paid and placed their money at the disposal of Mr. Cory and others, who affected to represent the whole body of those named as parties of the third part, put their hands and seals to the deed, under a confidence in the competency of the persons named as covenantees to form the intended partnership. Mr. Cory and the other covenantees in whom the confidence was placed, who received and dealt with the money, and then refused to execute the deed themselves, and were unable to form the partnership, are now said to be justified in treating the instrument, which has failed of effect for any other purpose, as being valid in its operation as a covenant of indem-

nity to themselves. As a question of law, it seems plain enough that an indenture of covenant containing stipulations on the part of the covenantor and covenantee, executed by the covenantor and not by the covenantee, who is named a party to the deed, but declines to execute it, and never acquires the character in respect of which he is made a covenantee, cannot be enforced as a covenant. This is a case in which the purposes, with a view to which the indemnity was intended to be given, never arose, and the deed itself, as well as the whole transaction, was incomplete. There was not the mutuality as to obligation, or as to interest, or as to liability, in contemplation of which the persons parties of the first part executed the deed. The shares in the company, in right of which the covenantors intended to enter into the obligation, never had a perfect existence; and the deed failing of all other purposes, and being executed by no other persons, fails also as a covenant to indemnify.

It remains, then, to consider how the case stands as to further proceedings under the petition of Mr. Cory. The petition and the order made upon it by the Court did not proceed upon any such view of the rights of the petitioner, or the Act of Parliament, or the covenant of indemnity, as has been argued at the bar. Indeed, if the petitioner had a valid covenant of indemnity, there could be no necessity for resorting to proceedings under the Winding-up Act. He would have ample relief at law under the covenant; and whether he is or is not entitled to that relief is a legal question, not depending on any of the enactments in the Act of Parliament under which this petition has been presented. What the Court has now to consider is, how, upon the facts as ascertained on the proceedings and evidence before the Master, the case ought to be dealt with under the Act of Parliament in force when the petition was presented, and the subsequent Act which Parliament has said shall be taken and construed, so far as practicable, as part of the former Act.

The order which referred it to the Master to wind up

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the affairs of the company was made in the faith that the allegations in the petition and the affidavit in support of it were true. These allegations and the terms of the order are not borne out by the facts as they now appear. The petition alleges the existence of the company, and says that it had "long since ceased to carry on the business of the company;" and, after thus averring the existence and cessation from business, it prays an absolute dissolution of the company and winding up of its affairs. Accordingly, the Court, by its order of the 6th of August, 1849, giving credit to these allegations, ordered that the company should be absolutely dissolved, and its affairs wound up.

As it is now clearly ascertained that there never was any business carried on by the company, that it never transacted any affairs, and, in fact, never had any existence, the continuance of proceedings by which it is pretended to wind up its affairs cannot be permitted without an accurate consideration of the rights of the parties who have become actors in this extraordinary litigation. The only debts which appear from the proceedings before the Master are the bills of costs of the solicitors, and the claim of the petitioner Mr. Cory for what he has paid to the secretary and surveyor, and for costs. The only purpose for which this litigation, which is called a winding-up, should proceed, is to determine who should contribute to pay these demands.

As to the debt alleged to be due in respect of the solicitors' bills, the first consideration is, who were the employers, and next, whether the proceedings under this petition should go on in order to work out the payment to the solicitors. The largest of the bills is said to be due to Messrs. A'Beckett & Sympson and Mr. Vaughan Prance. In his evidence, Mr. Sympson is asked whether there had been any proceedings previously to the 14th of October, 1845, which is the date of the first minute. His answer is in these terms:—"There had been something done, of course, to get people together—inquiries, and those sort

of things; the company had been got up, in fact." Being asked who was the getter up of this company, he replied "Mr. Prance." Then there occur the following questions and answers:—"Were you and he" (i. e. Mr. Prance), "jointly interested in the affairs of this company?" "There was no definite arrangement as to how we were to be interested, and I do not repudiate Mr. Prance's authority for what he did." "Had the proceedings, previously to the 14th of October, been conducted under Mr. Prance's superintendence?" "They had; and one or two gentlemen were promoters." "Who were they?" "Mr. Prance, Mr. Greene, and Mr. Vigors; but that can be seen by reference to the registration office." "Can you give us any account of the proceedings previous to the 14th of October?" "The only account I can give is, that those gentlemen had met together, stating that they had discovered a place where a line of railway could be carried, and getting of friends together."

This is the account of the proceedings anterior to the 14th of October, 1845. It is proper here to state that the first item in the bill of costs is dated August, 1845, and is a charge of ten guineas as a retainer on behalf of the promoters of the company. The second item is dated the 29th of August, and is a charge of 99*l.* 15*s.*; for Mr. Prance engaged his whole time from this day, in town and country, in taking steps for the formation of this company and so on,—arranging the number of directors, engaging local agents and secretary, collecting local information, data, &c. The provisional registration of the company is said to have been agreed to long before the first meeting on the 14th of October, and, in fact, had been effected on the 25th of September. Mr. Sympson, being asked to explain how the minutes of proceedings at meetings came to be in his handwriting Mr. Stuckey being the secretary, answers that he did it by way of precaution, and to protect his friends, and especially Mr. Vigors, his own relation—his father-in-law. Being asked whether he had brought any

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action for the bill, he answers, "No, no;" and afterwards he said, "It rests with myself to say whether I would be paid or not. I would have these gentlemen to do with me as they pleased. I could say, 'You are now out of the trouble; there is my bill, and do as you please.'" Mr. Vaughan Prance, in his evidence, after stating that he was joint solicitor for the undertaking, being asked when he first began to act, answers that he cannot tell. He was asked by the Master who was his employer at the time of the meeting, and replies, "It is very difficult to answer that question." The Master then says, "I mean, were you retained to act for the company in any capacity, by committee or any gentleman managing the affairs?" To which Mr. Prance's answer is, "Mr. Morrison was a person who interested himself as much as anybody in the matter." Without going further into the extraordinary disclosures in the evidence, this is enough to dispose of the case of these solicitors.

Besides the claim of the petitioner Mr. Cory, the only other demand which is alleged in the proceedings to be a debt of the company is the bill of costs of Mr. Weller, another solicitor, amounting to 96*l.* 12*s.* 6*d.* It is headed as the bill of costs of the provisional committee. The first item is dated the 25th of September, 1845, and is, for attending Mr. Sympson, Mr. Prance, Mr. Vigors, Mr. Pell, and Mr. Morrison, conferring on the proposed line of rail, &c. The second item is a retainer for the company, but by whom given is not stated; and probably could no more be stated by him than by Mr. Prance.

To continue the proceedings under the order made on this petition, which directs the absolute dissolution of a company which never was formed, and the winding-up of a business which never was carried on, in order to ascertain whether all or any of the persons whose names have been put down as contributories are liable to pay these bills of costs as debts of this unformed company, would be an abuse of the proceedings authorised by the Act of Parliament.

It is only doing justice to the solicitor, Mr. Sympson, to mention, that, under a just apprehension of the discredit which would attach to solicitors who might procure proceedings to be instituted under the Acts, with the view of obtaining payment of bills of costs incurred in abortive attempts to constitute joint-stock companies, and otherwise irrecoverable, Mr. Sympson in the beginning of his evidence disavowed any such purpose. He said, "You must quite understand that I do not come here in the interest of this winding-up. I distinctly state that publicly."

It now remains for me to consider what ought to be done with reference to Mr. Cory's (the petitioner's) own claims. What he demands is, that the other contributories, or some of them, should relieve him in respect to the payments which he has made to Mr. Tootal, whom he describes as the surveyor who acted on behalf of the alleged company, and to Mr. Stuckey, who acted as the secretary. In respect of these, he has paid 522*l.* 3*s.* 3*d.* That Mr. Cory had made himself legally liable to those demands appears from the amount having been recovered from him at law. But I can find nothing to shew that any other individual, whose name has been put down as a contributory, is liable. There is some evidence as to the employment of Mr. Stuckey, the secretary; for he distinctly states, when asked under whose directions he was acting, that he was introduced through Messrs. A'Beckett & Sympson.

The liability of the persons who executed the deed I have already disposed of. My opinion is, that against them the case entirely fails. It is important to notice, that the case attempted to be made out against those who executed the deed is not alleged in the petition at all. The petition makes a case for contribution only against the members of the provisional committee and committee of management. The allegation in the petition is, that "the provisional committee incurred debts, and that some of such debts and liabilities have been paid by means of sums contributed by some only of the members of the pro-

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visional committee and committee of management, but others of the debts remain undischarged; and several members of the provisional committee and committee of management, although contributories of the company, have failed to contribute any monies whatsoever for the purpose of paying the debts and liabilities of the said company." These allegations go to the liability only of the provisional committee and committee of management, and they are not borne out by the evidence. It appears that after Mr. Cory, the petitioner, had been compelled to pay the surveyor, he (Mr. Cory) brought an action in the name of the surveyor against Mr. Frewen, who had been named as one of the managing committee, and failed in that action, on the ground that, in fact, Mr. Frewen never had been a member of that body. But if any other, one or more, of the body concurred with Mr. Cory in employing the surveyor or secretary, no reason is suggested why he could not recover against them at law.

An order of the Lords Justices in this very matter, on the 23rd of March last, decided a question which goes very far to dispose of all that remains of the proceedings. By that order Mr. Dayrell's name was removed from the list of contributories as to the forty shares in respect of which he had been placed on the list, without prejudice to any application which he might make to have his name entirely removed from the list. Mr. Dayrell had not only been named as a member of the provisional committee and committee of management, but had attended meetings, and had even signed a cheque dealing with the monies paid by those who had executed the deed. With such an opinion as to the case of Mr. Dayrell, after the evidence now before the Court, it is difficult to see against whom these proceedings ought to be continued.

But there is another defect in these proceedings. Mr. Dayrell, like Mr. Cory and the other members of the committee, declined to execute the deed—declined to pay any money, and declined to take any shares. The

petition does not state that Mr. Cory took any shares, but it states that he became a member of the company. But, according to the interpretation clause of the Act, in order to be a member he must be a person "entitled to a share of the assets or accruing profits of the company." Therefore, neither Mr. Cory nor any of those committee-men were members of a company within the meaning of the Act. They could only be contributories by being members. It is true that any person merely claiming to be a contributory may, under the Act, present a petition. But when, on the proceedings under the petition, the character of contributories cannot be sustained, as to the actors, the whole case must fail.

There is another vice in these proceedings. The petition purports to make a case for the jurisdiction of the Court, upon a notice served under the third and fifth clauses of the 5th section of the Act of 1848. The service stated in the petition to have been made on Mr. Jerdein, who was one of the managing committee, cannot be considered as service on a director of the company. The evidence now shews that there never was any director of this company, and that there never was any company.

Upon the construction of the language of the clauses of the 5th section of the Act of 1848, it is plain to my mind that it applies only to the cases of companies, associations, or partnerships which have been actually formed, and as to which debts and liabilities have been incurred in carrying on the business. The counsel for the official manager in this case, feeling the difficulty of his task in sustaining these proceedings, admitted, that great evil had arisen from applying the provisions of the Act to cases of abortive attempts to form companies where no partnership had been established and no business carried on. I do not think it necessary to make any observations on the reported cases of decisions on the construction of the Winding-up Acts of 1848 and 1849, which have been referred to during the argument. These decisions

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have not been uniform, and seem to have varied according to the varying circumstances of particular cases. In the present case I find—first, the solicitors, and afterwards, at their solicitation, several other persons, were engaged in an attempt to form a partnership, each with a view to his own profit. In this attempt some gave their own labour, and also hired other labourers to assist in carrying on the work of inducing persons to advance sums of money, in the hope and for the purpose of forming a company, in which they might have shares. But the attempt to form the company entirely failed. No such company ever was formed. The failure left those who had employed the labourers exposed to liabilities in respect of the wages of the persons employed by them. I can find no just warrant for the interference of this Court to adjust their liabilities, and no proper machinery for the purpose in the Acts of Parliament.

If the Court attempts to deal with a series of transactions by various individuals in their unsuccessful attempts to form a partnership, on the footing that these transactions and the liabilities in respect of them are the affairs of a partnership, and to be wound up as partnership transactions, I can find no authority in the Acts of Parliament for such a proceeding, and I can have little doubt that it would produce great confusion and injustice. The present case is one example. After more than three years of proceedings in this Court on a false principle, not a single satisfactory conclusion on any point has been arrived at, or is even in prospect. Some of the evidence shews that attempts were made, and meetings held in 1846, and particularly in May, 1846, by members of the provisional committee and the solicitors, to arrange for payment of 50*l.* by each of them, in order to get rid of all the liabilities. These were meetings, in fact, to wind up the affairs of the provisional committee. But they failed, for the same reason that the proceedings under the order on this petition have failed, namely, that even the provisional committee had never been so associated or joined together as to be liable

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on any joint contract; and, therefore, the attempt even to wind up the affairs of the provisional committee failed.

My duty can only be discharged to the satisfaction of my own conscience, by putting an end to these proceedings. I must direct the order for a call to be discharged, and the official manager to repay all the sums of money to those from whom he received them. All further proceedings under the order for dissolving and winding up the affairs of this non-existing company must be stayed; with power to the official manager to make such application as he may be advised as to his remuneration, and as to his costs.

The petitioner, having failed in his litigation, ought, according to the general rule, to pay the costs of those who, through his proceedings, have been made parties to it. But I cannot make any order to that effect, because I cannot consider the petitioner as exclusively in fault, and I must leave all the parties to bear their own costs. As to the costs of the official manager, and his remuneration, the case is nearly that of a receiver appointed in a cause at the instance of a plaintiff whose case fails at the hearing; and it seems to me, that, as to the official manager, his claims must be dealt with on that footing. That is a question which I do not now dispose of, but must leave him to make such application as he may be advised. I wish it to be understood that the sum paid by Sir Robert Price, by way of compromise, should be repaid to him, as well as the sums paid by other persons.

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*Minute of Order.*

LET the Order of Master *Senior*, made in this matter, bearing date the 24th day of June, 1853, for a call of 1*l.* per share, to be made on all the contributories of the said company whose names are included in the list of contributories as allottees of shares who signed the deed in respect of the shares allotted to them, be discharged; and let all further proceedings in this matter be stayed, under the

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Order dated the 27th day of July, 1849, for winding-up the said company; and let the official manager of the said company repay all the monies paid to him to the persons from whom he received the same; with liberty for the said official manager to make such application to this Court relating to his costs, as he may be advised.

Reversed 5 De G. M. & G. 94.

Carey v. Hall 3 Sm. & G. 315.

*Nov. 5th*, 1854.

*Jan. 13th.*

1. A voluntary assignment by deed of an equitable reversionary interest in personal property is valid.

2. The assignment by deed of an equitable reversionary interest in personal property, is not to be treated as a mere agreement; and, although it be voluntary, is not an incomplete gift, but is a transfer of the beneficial interest of the assignor.

## VOYLE *v.* HUGHES.

BY the settlement made on the marriage of the late Admiral and Mrs. Dorothy Noble, dated the 10th of November, 1820, 3900*l.* 3*l.* per Cent. Consolidated Bank Annuities were vested in trustees, of whom the defendants William Tooke and Claud George Thornton became the survivors, in trust, after the death of Admiral Noble, and in case Mrs. Dorothy Noble should die in his lifetime without leaving issue, and without appointing the fund, (all which events happened), for her next of kin according to the statute of distributions, as if she had died unmarried and intestate.

Mrs. Noble died in July, 1840; Admiral Noble died in October, 1851.

In the year 1840, after the death of Mrs. Noble, Mrs. Jane Kürner, of Stuttgard, in the kingdom of Wirtemberg, widow, a sister of Mrs. Noble, duly executed at Stuttgard a deed, dated the 8th of November, 1840, in the English form, and prepared in England, being between Mrs. Jane Kürner of the one part, and Miss Caroline Sarah Noble, since deceased, who was a daughter of the late Admiral Noble by a former marriage, and who was, at the date of the deed, a spinster and resident in Switzerland, of the other part, whereby, after reciting the marriage settlement above mentioned and the death of Mrs. Noble, and that Mrs. Kürner was entitled to one fifth of the fund as

Approved in Re Turle 5 N.R. 67.

one of her next of kin, and had agreed to assign her share to Miss Noble for her own use and benefit, Mrs. Kürner, in consideration of natural love and affection, assigned the said share to Miss Noble in the usual manner, and gave her a power of attorney to demand and receive the same from the trustees. And Mrs. Kürner entered into the usual covenants for title, for quiet enjoyment, and for further assurance.

This assignment, when executed by Mrs. Kürner, was transmitted by her to Mr. William Tooke. Miss Caroline Sarah Noble was aware of its execution, and the provision made for her; and in February, 1842, having attained the age of twenty-one years, she wrote to Mr. William Tooke, requesting him to send her the deed. Mr. Tooke replied, that the deed, having been sent to him by Mrs. Kürner as her solicitor, and also as one of the trustees under the settlement, he did not feel justified in parting with it except by her express authority; but that Miss Noble might have a copy of it. A copy was accordingly furnished to her.

In March, 1842, Miss Caroline Sarah Noble forwarded to Mr. Tooke a written authority from Mrs. Kürner, dated the 22nd of February, 1842, to hand the deed to her the said Caroline Sarah Noble, and stating that she would have it when she came to London in the following month. Soon after he had received this, Mr. Tooke received from Mrs. Kürner a letter written by her, from Stuttgard, addressed to him, to the following purport:—

"I have written to Miss Sarah Noble, insisting on her giving back into your honourable hands the free gift of mine in her favour, &c. &c., regarding my share of my late sister Dorothea Noble's fortune, of which her father has the usufruct during his lifetime, as the English laws allow him; but in the possible, though not probable, case that he survive his daughter, he has no right whatever to my share, which devolves to my natural heirs, or, if I be

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yet alive, at my own further disposal again. Excuse, pray my dear sir, my occasioning you so much perhaps undue trouble."

"In case that the said Miss Sarah Noble has not given back into your hands the above document, I herewith authorise you, Mr. Thomas Tooke, Esq., to redeem it of her."

Mrs. Kürner died in March, 1844. She made a will, dated the 9th of November, 1827; a codicil, dated July, 1838; and a second codicil, dated September, 1843; and administration with the will and codicils annexed was, on the 12th of August, 1852, granted by the Prerogative Court of Canterbury to Maria Henrietta Hughes, on the renunciation of the executors named in the will.

Miss Caroline Sarah Noble and Mr. Francis Elliot Voyle, of Hazara, in the East Indies, intermarried in the month of April, 1844; and Mrs .Voyle died on the 14th day of October, 1852; and letters of administration to her estate were, by the Prerogative Court of Canterbury, granted to Mr. Patrick Alexander Reynolds, as the attorney and for the use of Mr. Voyle. No settlement or agreement for a settlement was made before or on the marriage of Mr. and Mrs. Voyle.

The trustees divided all the fund except a sum of 763*l.* 13*s.* 8*d.*, being the one-fifth share in question, which they re-invested in their names in the purchase of 781*l.* 5*s.* 3*d.* 3*l.* per Cent. Consolidated Bank Annuities; and this share the trustees decline to pay to the plaintiff without the order of the Court, by reason of the letter of the 12th of February, 1842, and the claim made to the share by the administratrix of Mrs. Kürner.

This was a suit by Mr. Voyle against Mr. Tooke and Mr. Thornton the trustees, the administrator of Mrs. Kürner, and the administrator of Mrs. Voyle.

The bill, after stating the above facts, prayed for a declaration by the Court, that, by virtue of the deed of the

8th of November, 1840, and the covenants therein, and the other matters in the bill stated, the plaintiff, either as against the estate of Mrs. Kürner or in the administration thereof, was entitled to the full amount of Mrs. Kürner's share, as one of the next of kin of Mrs. Noble, in the trust fund; and that the trustees might be ordered to transfer to the plaintiff the sum of 763*l.* 13*s.* 8*d.*, and the investments and dividends thereof.

*Statement.*

Mr. *Glasse* and Mr. *Cairns* for the plaintiff.—The plaintiff is entitled to a decree giving him the 763*l.* 13*s.* 8*d.* specifically. It is admitted, that there being no affinity between Mrs. Kürner and Miss Noble, such as to be a good consideration for the gift contained in the indenture of assignment of the 8th of November, 1840, it was a voluntary assignment of a reversionary interest in personal property; but it was made by deed, and was perfected with all the formalities of which such an assignment was capable, including distinct notice to the trustees. Whatever may be the effect in this Court of mere contracts to assign, requiring the aid of the Court to their perfection, as to which some cases may be cited unfavourable to such a contract, the recent case of *Kekewich* v. *Manning* (*a*) has decided the question. Nearly every case upon the subject was cited to the Court of Appeal; and after an elaborate review of the authorities by the Lord Justice *Knight Bruce*, the Court decided that a voluntary settlement of an equitable reversionary interest in personal property, consisting of money in the funds, was a complete alienation of that reversionary interest, so as to be capable of being enforced against trustees of another settlement of the same funds made for valuable consideration by the then settlor of the voluntary settlement. Referring to, and relying on, the judgment of the Lord Justice *Knight Bruce* in that case, the plaintiff rests his claim

*Argument.*

(*a*) 1 De G., Mac., & G. 176.

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on that authority. The Lord Justice puts a case thus:—"Suppose stock or money to be legally vested in A. as a trustee for B. for life, and subject to B.'s life interest for C. absolutely; surely it must be competent to C. in B.'s lifetime, with or without the consent of A., to make an effectual gift of C.'s interest to D., by way of mere bounty, leaving the legal interest and legal title unchanged and untouched. Surely it would not be consistent with natural equity, or with reason or expediency, to hold the contrary, C. being sui juris, and acting freely, fairly, and with sufficient advice and knowledge. If so, can C. do this better or more effectually than by executing an assignment to D.? It may possibly be thought necessary to the complete validity of such a transaction, that notice should be given to A. Upon that we do not express an opinion."

The case put by the Lord Justice is the present case. Here, also, notice has been given to the trustees, which the Court, in *Kekewich* v. *Manning*, did not consider to be necessary in addition to the assignment. *Meek* v. *Kettlewell* (*a*) will be relied on by the defendants as an authority, that a reversionary interest could not be effectually assigned to a volunteer. That case was cited, and relied on in the argument in *Kekewich* v. *Manning;* and the doctrine on which the decision in that case proceeded, must be considered as having been overruled.

Although the Vice-Chancellor Sir *James Wigram* held, in *Meek* v. *Kettlewell* (*a*), was not assignable to a volunteer, yet in the case of *Cox* v. *Barnard* (*b*), that learned Judge, in the administration of assets, enforced against the estate voluntary assignments made by the testator of annuities, mortgage debts, and policies of assurance, even where no notice of the assignments had been given in the grantor's lifetime to the mortgagors or grantors, where the assign-

(*a*) 1 Hare, 464; *S. C.*, on appeal, 1 Ph. 342. (*b*) 8 Hare, 310.

ments contained covenants for further assurance by the testator, his executors, and administrators. If, therefore, any distinction can be drawn between this case and the principles of the decision in *Kekewich* v. *Manning*, yet, inasmuch as the deed of the 8th of November, 1840, contains covenants for title and for further assurance, the plaintiff is entitled, at least as against the estate of Mrs. Kürner and in the administration of her estate, to be paid and satisfied the sum of 763*l.* 13*s.* 8*d.*, as asked in the alternative in the prayer for relief.

Mr. *Russell* and Mr. *G. S. Law* for the defendant, the administrator of Mrs. Kürner.—The case of *Meek* v. *Kettlewell* is precisely similar to the circumstances here; and if that decision is ever to be followed, it must be in the present case. The whole current of authority supports the decision in the case last cited: *Edwards* v. *Jones*(*a*), *Holloway* v. *Headington* (*b*), and the cases there cited. The assignment was not of itself sufficient: all that could have been done to give it effect was not done. Notice of the assignment may have been given to the trustees; but it was not enough, there should have been an acceptance of the trust for Miss Noble instead of for Mrs. Kürner, and a declaration by them that they held as trustees for Miss Noble. In *M'Fadden* v. *Jenkyns*(*c*) there was an acceptance of the trust, and there the voluntary assignment was held to have been perfected; whilst in *Bentley* v. *Mackay*(*d*) there was no such acceptance of the new trust by the trustee, and the settlement was on that account held to be ineffectual and void. The case of *Kekewich* v. *Manning* is not inconsistent with the decision in *Meek* v. *Kettlewell*, and the numerous cases of the same kind, that a voluntary assignment of a mere equitable interest in remainder

(*a*) 1 My. & Cr. 226.
(*b*) 8 Sim. 324.
(*c*) 1 Ph. 153.
(*d*) 15 Beav. 12.

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*Argument.*

of personalty cannot be assigned. Two circumstances in that case are sufficient to make a distinction between it and *Meek* v. *Kettlewell* and the present case. Lady Farrington being entitled to the equitable interest in remainder, which she assigned by way of settlement on her first marriage, was, as a daughter, entitled to the enjoyment of the fund absolutely on her mother's death; and the fund was actually standing at the date of the settlement in the names of the mother and Lady Farrington, the daughter (then Miss Kekewich), and the daughter actually survived her mother before the institution of the suit. Now, by virtue of the assignment and of the power of attorney which the donor gave to the trustees of that settlement, the right to call for the assignment was vested as fully as it could be in the trustees of Lady Farrington's first marriage, and the suit was instituted by those trustees as well as the person who was called a volunteer, as taking beneficially under that first settlement against the lady. Moreover, that first settlement was an assignment to trustees for valuable consideration, and was effectual as such at the time. The right to the fund having thus for valuable consideration been vested in the trustees, all the trusts of the settlement attached upon the interest which had so vested in the trustees, including the trust for Messrs. Brodney, although, if that trust had stood alone, it might have been a trust for a volunteer: *Davenport* v. *Bishop* (*a*), and the numerous cases there cited.

The case of *Kekewich* v. *Manning* is not therefore opposed to the doctrine of this Court, that an assignment of an equitable reversionary interest in personalty by the person entitled only in reversion or remainder, even where accompanied with notice to the trustee of the personal property, does not pass the title to the assignee. If this be the law, then the plaintiff is not entitled to a decree giving

(*a*) 2 Y. & C. C. C. 451.

her the 763*l.* 13*s.* 8*d.* stock. The plaintiff is not entitled to recover the amount in this Court against Mrs. Kürner's estate upon the covenants for title and further assurance, nor any sum by way of damages for breach of the covenant. All that the Court can do is to retain the plaintiff's bill for a year, with liberty to the plaintiff to sue at law upon the covenant in the deed: *Colman* v. *Sarrel* (*a*).

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Mr. *Dryden* for the defendants Tooke and Thornton, the trustees.

Mr. *Glass* replied.

His HONOUR, at the conclusion of the argument, said, the case was one of the greatest possible importance, and he should look into the authorities before he disposed of it.

The VICE-CHANCELLOR now said:—

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*Jan.* 13*th.*
*Judgment.*

The question in this case is as to the validity of a voluntary assignment by deed, duly executed, of a reversionary interest in a sum of money in the public funds, standing in the names of the trustees of the settlement under which the assignor was entitled. According to the decision in the case of *Meek* v. *Kettlewell* (*b*) as affirmed on appeal, this instrument is to be treated, not as an assignment, but as a mere agreement; and, being voluntary, and without any valuable consideration to support it, it confers no right on the seeming assignee to which this Court can give effect. The soundness of the doctrine which treats a deed of assignment, complete in form, as a mere agreement, although it in terms assigns and transfers an equitable reversionary interest in personal property, and which denies to it in this Court, if voluntary, any effect as a transfer of the right to property, has been much questioned. If that doctrine is to prevail, it deprives the owners of reversionary personal property of the right of alienation by one legitimate mode. As abridging the right of alienation, it materially

(*a*) 1 Ves. jun. 50. (*b*) 1 Hare, 464; *S. C.*, on appeal, 1 Ph. 342.

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lessens the value to its owners of the enormous and increasing amount of reversionary personal property. Fortunately, in the recent case of *Kekewich* v. *Manning* (*a*), a more liberal and enlightened view of the law upon this subject was taken. In the present case, the question arises in a simple form. Under the trusts of the marriage settlement of 1820, the sum of 3,900*l.* 3 per Cent. Consolidated Bank Annuities was vested in the names of trustees (of whom the defendant Tooke is the survivor), upon trust, after the death of Admiral Noble, and in case his wife should die in his lifetime without issue, and without appointing the fund (all of which events happened) for her next of kin, according to the statute of distributions, and as if she had died unmarried and intestate. In 1840 Mrs. Noble died, so that upon her death her next of kin had a vested interest, subject only to the life estate of Admiral Noble, who died in 1851. After Mrs. Noble's death in 1840, Mrs. Kürner, one of her next of kin, having thus a vested interest in one-fifth of the fund, subject only to Admiral Noble's life estate, executed the deed of assignment under which the plaintiffs claim. The assignment is by deed dated the 8th of November, 1840. It recites the title of Mrs. Kürner under the settlement, and is in form an absolute assignment by Mrs. Kürner of her one-fifth of the trust fund to Caroline Sarah Noble, and gave her a power of attorney to receive it from the trustees. The deed contains a covenant for further assurance and quiet enjoyment. The consideration expressed in the deed is natural love and affection; but as Caroline Sarah Noble was a daughter of the admiral by a former marriage, there was no relationship in blood to Mrs. Kürner; the assignment, therefore, is purely voluntary. Mrs. Kürner, the assignor, herself transmitted the deed to Mr. Tooke, the trustee, who gave a copy of it to Miss Noble. It has been argued, that, as this assignment is purely

(*a*) 1 De G., Mac., & G. 176.

voluntary, it is a mere agreement, without any consideration to support it; that it is imperfect as a gift; imperfect, too, as a declaration of trust, and must wholly fail. Each of these three objections assumes an imperfection in the assignment, which is unfounded in fact; it is not an agreement, it is an absolute assignment by deed, purporting to transfer the estate or interest of the assignor to the assignee. As between them the transaction is complete; notice was given to the trustee, and that notice completed the transaction as to third parties; it established the right of the assignee on any question of priority, and protected her against any fraudulent receipt by the assignor. All this carries the transaction beyond mere agreement.

Nevertheless, Lord *Hardwicke* and other Judges have said that the assignment of reversionary personal property, for valuable consideration, "operates by way of agreement or contract, amounting, in the consideration of the Court, to this, that one agrees with the other to transfer and make good that right or interest." To treat an actual assignment by deed as a mere agreement, was a device resorted to in the earlier efforts to get rid of the legal doctrine, "that no possibility, right, title, nor thing in action shall be granted or assigned to strangers." The progress of law as a science, keeping pace, although not uniformly, with the advancement of civilization and wealth, has sanctioned modes of alienation and enjoyment of property, both real and personal, which were prohibited by the common law. During the successive steps of this progress, strange anomalies occasionally prevailed. Contingent and executory interests in chattels or personal estate were allowed to pass by testamentary disposition before contingent inheritable interests in land. It is only by modern decisions that the same power of testamentary disposition, before allowed to chattels personal, was extended to inheritable contingent interests and possibilities. That a valid voluntary disposition of contingent and executory or reversionary interests and possibilities might be made by will, but not by

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deed, was an anomaly which could not long be tolerated. Even before assignments of reversionary interests, possibilities and expectancies of personal property were supported on the ground of agreements or by force only of a valuable consideration: more than one great Judge of this Court had endeavoured to get rid of the strict rule of law.

Lord Chancellor *Cowper*, in the case of *Thomas* v. *Freeman* (*a*), says, "It is a notion that has obtained at law, that a possibility is not assignable, but no reason for it if res integra; but the law is not so unreasonable but to allow that it may be released." And that same Judge, soon after, in *Crouch* v. *Martin* (*b*), held, that a chose in action is assignable in equity upon a consideration paid. In the case of *Lord Carteret* v. *Paschal* (*c*), it was carried further, for it was said to be admitted on all sides that if a man in his own right be entitled to a bond or other chose in action, he may assign it without any consideration. But this view was not constantly adhered to; and there are several subsequent cases in which a valuable consideration was held necessary to support an assignment of mere personal property. Even after the decisions in *Sloane* v. *Cadogan* (*d*) by Sir *W. Grant*, and *Fortescue* v. *Barnett* (*e*) by Sir *John Leach*, it was held by Sir *James Wigram* and Lord *Lyndhurst*, in the case of *Meek* v. *Kettlewell* (*f*), that the want of valuable consideration to support the assignment made it ineffectual in equity. The more recent decision, in the case of *Kekewich* v. *Manning*, in which the authorities were reviewed, and in which the assignment was held to be valid, notwithstanding the want of valuable consideration, is sufficiently supported by authority, and rests on a sound and intelligible principle. The argument which treats the deed of assignment as a mere agreement or executory instrument, rests on this, that the

(*a*) 2 Vern. 563.
(*b*) Id. 595.
(*c*) 3 P. Wms. 197.
(*d*) Sugd. Vend. & Pur., App. 24.
(*e*) 3 My. & K. 36.
(*f*) 1 Hare, 464; *S. C.*, 1 Ph. 342.

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property is not transferable at law. But if that be a reason for treating the deed not as an actual conveyance, which it purports to be, why should it not as well apply to all conveyances of equitable interests in real or personal estate, which are not transferable or even conusable at law? (*a*)

The deed of assignment being a perfect instrument, there is no room for the argument against its effectiveness founded on the doctrine that an incomplete gift is invalid in equity. In the cases of *Antrobus* v. *Smith* (*b*), and *Edwards* v. *Jones* (*c*), there was no deed of assignment, no completeness in the transaction. In *Antrobus* v. *Smith* the prayer of the bill was, that a proper deed of assignment might be executed.

As to treating an assignment by deed as a declaration of trust, or refusing to it any operation because it cannot be properly treated as a declaration of trust, there seems no legitimate ground for such an argument. If a deed of actual assignment of an equitable interest has any operation in equity as divesting the assignor of his equitable right, it is an operation no more in the nature of declaring a trust than any other actual conveyance of any equitable estate or interest in real or personal property. Therefore, there seems no other just view of this case than that which treats the instrument as an actual deed of assignment, and not as a mere agreement or executory instrument. And, if in the case of an assignment of an equitable reversionary interest in personalty for valuable consideration, the assignment, being by deed, transfers the property from the assignor to the assignee, and is not a mere agreement, the actual assignment by

(*a*) In *Sir Moyl Finch's case*, 42 & 43 Eliz., as stated by Lord Coke, 4 Inst. 85. b., it was resolved by all the Judges that a trust in land could not be assigned over, "because it was a matter in privity between them, and was in the nature of a *chose in action*, for he had no power of the land, but only to seek remedy by subpœna and not by the cestui que use."

(*b*) 12 Ves. 39.

(*c*) 1 My. & Cr. 226.

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deed of the same kind of property, without any valuable consideration, is not a mere agreement, and is not merely executory, but is an actual transfer of an equitable right. This puts it beyond the infirmity of an incomplete gift, or the case of a right resting merely in contract, which requires a valuable consideration to induce a Court of equity to interfere.

My decision proceeding on these views, it is scarcely necessary to advert to the argument on the effect of the covenant for further assurance, and on the case of *Cox* v. *Barnard* (*a*), where such a covenant was treated as creating a debt. No doubt, damages recovered for the breach of such a covenant would be *a* debt. But the covenant itself being *in fieri* and clearly executory, could hardly *per se* be a debt. Being voluntary and executory, it might be considered as within the doctrine of *Sutton* v. *Lord Chetwynd* (*b*), and the other cases in which the Court has refused to interfere on a voluntary covenant. Whether that doctrine is to be applied only to a claim for specific performance, or how the Court ought to deal with such a covenant in a case like the present, would require a very deep consideration of the principles of this Court as to covenants, into which, for the purpose of this case, it seems unnecessary to enter. Upon the whole, my opinion is, that, by force of the deed of assignment, the equitable right was transferred by Mrs. Kürner to Miss Noble; that the transaction was completed by Mrs. Kürner's execution of the deed, and that no valuable consideration was necessary to support the assignment. The plaintiffs, therefore, are entitled to a decree for the transfer of the fund.

By consent, the costs of all parties were ordered to be paid out of the fund.

(*a*) 8 Hare, 310. (*b*) 3 Mer. 249.

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## COLDWELL *v.* HOLME.

*Jan.* 16*th.*

A testatrix bequeathed 200*l.* to the Benevolent Institution, for delivering poor married women at their own habitations. Ten years previously to the date of the will a society bearing that title, of which she had been a member, had ceased to act; but at the date of the will there was, and had been long existing, a society, called "The Royal Maternity Society for delivering poor married women at their own habitations:"—*Held*, that this society answered the description in the will, and was entitled to the legacy.

THIS was the petition of Sir John William Lubbock, the treasurer of The Royal Maternity or Lying-in Charity, for delivering poor married women at their own habitations; and it prayed the payment to him of a legacy of 200*l.*, with interest.

By her will, dated the 12th of March, 1846, Mary Satterthwaite, among other charitable legacies, bequeathed "the sum of 200*l.* to the treasurer of The Benevolent Institution for the delivery of poor married women at their own habitations;" and she directed that this legacy (inter alia) should be applied by the treasurers of the societies or institutions in her will mentioned, for the uses and purposes of the said societies or charitable institutions respectively, and should be paid free from legacy duty or other deductions, out of such part of her personal estate as might by law be applicable for that purpose.

The testatrix died shortly afterwards, and her will was duly proved by her executors. At the date of her death, the only society in existence for administering the species of charity contemplated by the testatrix, was a society founded in 1757, called The Royal Maternity Society for delivering poor married women at their own habitations, the transactions of which were conducted at 17, Little Knight Rider-street, Doctors Commons; prior to 1807, this society was called The Lying-in Charity for delivering poor married women at their own habitations; but, in 1824, it adopted its present name.

It appeared in evidence, that, from 1817 to 1836, when it ceased to act, there existed in London a society, called The Benevolent Institution, for the sole purpose of delivering poor married women at their own habitations, the business of which was carried on at Agar-street, of which,

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for several years previously to its dissolution, the testatrix was a life member, having paid one subscription of 10*l.* 10*s.* In 1835, the funds having become insufficient, it was thought expedient that the society should cease to act, and the remaining capital was accordingly applied in payment of all charges due and owing; and the next year the society was discontinued, without, however, any formal proceeding to dissolve it. An affidavit was produced, of a maid-servant, named Ann Jones, to the effect that she had lived with the testatrix upwards of twenty years, and had frequently heard her mention having recommended poor women to a society of which she was a member, but without stating the name of the society.

*Statement.*

*Argument.*

Mr. *Malins* for the petition.—At the date of the will, there was in being but one institution at all answering the description given by the testatrix. Then arose the question, was that description sufficient? The character of the society intended was precisely described, though there might be a misdescription as to the name. It was submitted, that where the intention was clear, an error in description would be relieved against in this Court. In *Horwood* v. *Griffiths* (*a*), there had been a misdescription of the species of stock intended; but, the intention being clear, his Honour had relieved against the error; and that decision had been affirmed by the Lords Justices on appeal. But, at all events, it was clear that the intention of the testatrix was, to dedicate this sum to this particular species of charity; and, therefore, even if the charitable object primarily intended must fail, the Court would still be at liberty to make a cy près application of the gift.

Mr. *Rogers* appeared for the executors of the testatrix, and took no part in the contest.

(*a*) Not reported.

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Mr. *Southgate* appeared for the treasurer of the defunct society, and disclaimed any interest in the legacy.

Mr. *Daniel* and Mr. *Taylor* for the residuary legatees.—If the society, which had ceased to act in 1836, were now in existence, there could be no doubt it would be entitled to the legacy, because there would then be an object exactly answering the description given in the will. But if this proposition were established, and it could not be disputed, upon what ground could another society now claim to be entitled to the legacy. The Benevolent Institution was either clearly the object of the testatrix's bounty, or that object was doubtful: in the former alternative, the legacy failed by reason of the failure of the object intended; in the latter, the gift was void for uncertainty. But, then, it was contended, that there was here a clear gift for charitable purposes, and that, if the object primarily intended should fail, the Court would make a cy près application of the testatrix's bounty. But there was here no case for the application of the doctrine of cy près. Supposing, for argument sake, it might be in doubt for which of these two charities the gift was designed, it was, at all events, certain that it was bequeathed to one of them. There was, therefore, in this case, no intention to dedicate a fund to charitable purposes generally, but the gift was confined to one object, though what that object was might be more or less obscure. If that were a true view of the intention, it was clear, on the authorities, that the doctrine of cy près had no application. In *Clarke* v. *Taylor* (*a*) Vice-Chancellor *Kindersley* points out the distinction between a gift to charity generally, indicative of a general charitable purpose, pointing out the mode of carrying it into effect, and an intention, not of general charity, but to give to some particular institution. In the former case, the doctrine of cy

(*a*) 1 Drew. 644.

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près is applicable; in the latter, as here, the gift fails, because there is no such institution.

The VICE-CHANCELLOR:—

The argument founded on the authority of *Clarke* v. *Taylor* appears to me to fail altogether. In that case, it was held that a gift to a charity by a very particular name and special description, was not a gift for charitable purposes generally. There was no object at all answering the description contained in the will; and the Court held it could not regard the legacy as dedicated to the purposes of general charity. The question to be decided here is wholly different. There is a clear gift for the benefit of a charitable institution, for delivering poor married women at their own habitations, and there is in existence such an institution. So far, the bequest is free from all ambiguity. But a doubt is created by the fact, that there was formerly, though it no longer exists, a similar institution for precisely the same charitable purpose, the name of which more exactly answers the description in the will than the present claimant, and of which the testatrix was herself a member. The doubt arises from the circumstance, that, if both societies were now in existence, and both claimants, the non-existent society, as more accurately described, would be entitled. The dissolution of that society being before the date of the will, leaves but one claimant.

It would be proceeding on a very unsound principle, in a case in which there is and was at the date of the will but one society at all answering the description, if, in the absence of any evidence to justify such a conclusion, I were to assume that the testatrix was ignorant that the society of which she had been a member had been dissolved, and ignorant also that there was a society in existence similar in name and identical in purpose. I do not think there is the least evidence to warrant such an assumption. I think, therefore, that the present claimants, being suffi-

ciently described, are entitled to the legacy, and that, were I to hold otherwise, I should be defeating the intentions of this benevolent lady. I shall, therefore, declare that the present petitioner is entitled to the legacy, and I must direct the costs to be paid out of the estate.

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*Judgment.*

## WHITLOW *v.* DILWORTH.

*Jan.* 16*th.*

A husband and wife, in America, by a deed of separation, agreed to live apart, and that the wife should be at liberty to carry on business &c., and to retain for her own use, all her present and future property, in any way acquired. Subsequently a legacy, having accrued in right of the wife, was carried to the account of the husband and wife. Nothing having been heard of the husband for fourteen years, on a petition presented by the wife, asking the transfer to her of the stock, the Court directed the stock to be sold, and the proceeds paid to her on her sole receipt.

THIS was the petition of Ann Owen, of Brooklyn, New York; and it prayed, that the sums of 365*l.* 16*s.* 11*d.* 3*l.* per cent. Consols, and 31*l.* 19*s.* 6*d.* cash, standing to the account of the share of Henry Owen and Ann his wife, might be transferred to the petitioner.

It appeared, that, in 1839, Ann Owen and her husband, being then domiciled in America, in consequence of family differences, agreed to separate; and a deed of separation was accordingly executed, by which it was agreed, that the wife should thenceforth live apart as a feme sole, and be at liberty to carry on business, &c., and hold all the property to which she was then entitled, or to which she should become entitled by purchase, devise, or otherwise, for her sole use. Immediately after the execution of the deed, the husband left his wife permanently. In 1849, Ann Owen became entitled to the fund in question, under the will of Robert Whitlow, which, by an order on further directions, dated 17th of November, 1849, was carried to "The account of the share of Henry Owen and Ann his wife."

An affidavit had been made by the wife in support of the petition, that she had never had more than two children, who were both deceased; that, from the time her husband had left her, in 1839, she had never heard from or of him; and that there never had been any settlement made or agreed to be made on her marriage.

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*Statement.*

Affidavits were also produced, made by Mr. Charles Edwards, described as counsellor, notary, and attorney, and standing counsel to the British Consulate at New York, and by his clerk, to the effect, that inquiries had been made at Sackett's Harbour, Jefferson's county, State of New York, where some connexions of the husband had resided, and where it was supposed he might be heard of; but that it had been ascertained they had removed to Rome, Oneida county, whither they had been followed, but that no trace of them or of the husband could be found. As a last resource, the copy of the petition had been inclosed in a letter, and "mailed," addressed to Henry Owen, Rome, Oneida county, State of New York; but no reply had been returned.

*Argument.*

Mr. *Roxburgh*, for the petition, urged, that, after a great lapse of time without news from or of him, the Court would presume the death of the husband. But, even if the husband were not dead, under the deed of separation the wife was entitled to the fund.

*Judgment.*

The VICE-CHANCELLOR said, the difficulty he felt was, that the order made on further directions recognised the husband's interest in the fund. But, as it seemed to have been made in ignorance of the deed of separation, and as it was clear that the stock was property accruing in right of the wife, and that the husband was no longer providing for her maintenance, and had separated himself from her for so many years, and could not be found, he thought the order might be made.

An order was then made, directing the stock to be sold, and paid to Ann Owen on her sole receipt; the costs to be paid out of the cash.

1854.

## M'CORMICK *v.* GARNETT.

*Jan.* 18*th.*

A testator, having lent to J. M. 200*l.*, bequeathed 500*l.* to J. M.'s wife. The loan not having been repaid, the Court directed one moiety of the legacy, principal and interest, to be invested and settled on the wife and her children, and the debt due to the testator's estate to be set off against the remaining moiety, and the surplus to be paid to the husband.

The wife's equity to a settlement is paramount to any right in the executor to have a debt due to the testator by her husband set off against a legacy to the wife, out of which she is entitled to a settlement.

WILLIAM M'CORMICK, by his will, dated the 14th of May, 1840, bequeathed several pecuniary legacies, and, among others, "to Mary Macdonald, wife of John Macdonald, of Ben Nevis, North Britain, distiller, the sum of 500*l.* sterling."

The testator gave the residue of his property to his infant son, and died on the 28th of June, 1840. The present bill was filed on the 14th of April, 1841, to administer his real and personal estate; and the usual order of reference was made to the Master to ascertain the debts, legacies, &c. In pursuance of which, Master *Lynch*, by his report, found that there was due and owing to the testator's estate from John Macdonald, of Ben Nevis, the sum of 200*l.*, which the testator had advanced to John Macdonald, by accepting a bill of exchange for that amount. The Master found that letters had been addressed to the testator by John Macdonald, admitting the debt. The executors claimed a right to set off the debt against an equivalent part of the legacy, on the ground, that the law of Scotland did not recognise the equity of the wife to a settlement. It was in evidence that Mr. and Mrs. Macdonald were and had always been domiciled in Scotland.

About 200*l.* was due on the legacy for interest.

The cause now came on upon further directions.

*Argument.*

Mr. *Bacon* and Mr. *Fielding Nalder* appeared for the executors.

Mr. *Craig* for Mr. and Mrs. Macdonald.—It cannot be disputed, that the equity of the wife to a settlement is paramount to any right to set off the legacy, or any part of it, against a debt due by the husband to the testator's estate.

1854.

M'CORMICK v. GARNETT.

*Argument.*

Then arises the question, whether the debt due from the husband may be set off against a sufficient portion of the residue? It was submitted, that the principle of set-off had no application to a case like the present. In *Carr* v. *Taylor* (*a*), in which a benefit accrued to the wife as next of kin, it was held, that the administrator was not at liberty to set off against the legacy a debt due by the husband to the intestate's estate. In the case of *Freeman* v. *Lomas* (*b*), where the legacy had survived to the husband, it was held, that the legacy could not be set off against a debt due from the husband. Suppose, in this case, the Court were to make a decree, directing the debt due from the husband to be set off against a competent part of the legacy, and the husband were to die before the order could be carried into effect, it was quite clear, on the authorities, that the wife would be entitled to have the whole legacy paid to her. Tried by this test, it was obvious that the legacy was incapable of being set off against the husband's debt.

In the course of the argument, the following cases were mentioned:—*Leslie* v. *Baily* (*c*), *Ex parte O'Farrell* (*d*), *M'Mahon* v. *Burchett* (*e*), *Lee* v. *Egremont* (*f*).

Mr. *Glasse* and Mr. *Cairns* appeared for the plaintiff, the infant son of the testator, but were not called on by his Honour.

*Order.*

The VICE-CHANCELLOR then made the following order:—The amount due in respect of the legacy of 500*l.* principal and interest, to be verified by affidavit. One moiety of that amount to be invested in 3*l.* per cent. Consols, and carried to an account, to be intituled "The settlement of Mrs. Macdonald and her children." The dividends to be paid

(*a*) 10 Ves. 574.
(*b*) 9 Hare, 109.
(*c*) 2 Y. & C. 91.
(*d*) 1 Glyn & J. 347.
(*e*) 5 Hare, 325.
(*f*) 5 De G. & S. 349.

to her during her life or until further order, with liberty to apply. The defendants the executors to retain 200*l.* out of the remaining moiety of the legacy of 500*l.* and interest, and the residue thereof to be paid to Mr. Macdonald or his assignee. Mr. Macdonald's costs to be paid out of the estate.

1854.
M'Cormick v. Garnett.
*Order.*

## GRISSELL *v.* PETO.

*Jan.* 19*th.*

A lessor, being in possession of a lease of certain messuages, granted an under-lease of one (No. 7) to A., who subsequently assigned it to B. The lessor by his will demised the leaseholds to trustees, who, under an order of the Court, sold inter alia No. 7 to a purchaser, in the particulars of sale No. 7 being described as leased to A. On investigating the title, it appeared that the parcels set out in the underlease to A. were, by a clerical mistake, the parcels of No 6. The trustees, after the sale, obtained an order of the Court to correct this mistake, by authorising an assignment to the tenant of No. 6, and a new underlease, with proper parcels, to the tenant of No. 7; and the Court overruled an objection to the title by the purchaser of No. 7, and compelled him to complete his purchase.

By an order, dated 9th of December, 1852, made in these causes, certain leasehold houses, vested in trustees, were directed by the Court to be sold. The houses had been built by Mr. Henry Peto, the testator in the cause, upon plots of land granted to him in 1823 by the Commissioners of Woods and Forests for a term of eighty-eight years, at a ground rent of 5*l.* per annum for each plot. Upon the 1st of December, 1823, Mr. Peto granted to a Mr. Lewis Mackenzie a lease of that date of the house No. 7, for a term of eighty-seven years and a-half, from the 29th of September, 1853, at a yearly rental of 50*l.*, which lease had been subsequently assigned by Mr. Mackenzie to Lord Walsingham, in whom it was now vested. Mr. Peto subsequently devised the original lease to his trustees upon certain trusts, of which the performance was decreed in this suit. The property was sold under the decree of the Court on the 20th of April, 1853, by public auction, when Lot 3, being No. 7, Upper Portland-place, was knocked down to Mr. Charles Goding at the sum of 1030*l.*

It was described in the particulars of sale as follows:—"Lot 3. An improved rent of 45*l.* per annum, arising out of a leasehold residence and stabling, being No. 7,

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*Statement.*

Upper Portland-place, Regent's Park, nearly of a similar description as Lot 2, to which it adjoins. The property is held under a lease, of which fifty-eight years are unexpired on the 5th of July, 1853, at a small ground rent of 5*l.* per annum, underleased to Lewis Mackenzie, Esq., whose term expires at Lady-day, 1911, at 50*l.* per annum. The estimated annual value is 250*l.*"

Upon the delivery of the abstract, it was ascertained that, in the lease granted of No. 7, in 1823, by the testator to Mr. Mackenzie, the parcels set out were, by some inadvertence, not the description of No. 7, but of No. 6. Immediately upon the mistake being discovered, the purchaser refused to complete the contract. The plaintiff thereupon, acting under the advice of Mr. *Lewin*, the Conveyancing Counsel, proposed to cure the defect by granting to Lord Walsingham, the assignee of Mr. Mackenzie's term, a lease commensurate with the residue of the lease granted by the testator to Mr. Mackenzie; and a petition was presented by the trustees to the Court for liberty to proceed against the purchaser; upon which, on the 21st of June, 1853, the Court made the following order:—

Upon reading the petition, and upon the Right Honourable Lord Walsingham joining in the assignment to be made by the petitioners to Francis Richardson (the lessee of No. 6) of the house No. 6, Upper Portland-place, in the parish of St. Marylebone, in the county of Middlesex, this Court doth order, That an underlease be granted by the petitioners to Lord Walsingham, of the house and premises No. 7, Portland-place, for a term which will expire at the like period as the underlease, dated the 1st of December, 1823, would have determined by effluxion of time, at the like rents, and subject to the like covenants, conditions, provisoes, and agreements as are reserved, expressed, and contained in and by the said underlease; and in case Charles Goding, in the petition mentioned, shall refuse to complete and perform his contract made for the purchase

of the said house and premises, No. 7, Upper Portland-place, it is ordered, that the petitioner be at liberty to apply by summons, at Chambers, to enforce the performance of the said contract.

*Statement.*

The purchaser declining to complete the contract a summons was taken out before the Judge, at Chambers, but was subsequently adjourned to Court.

*Argument.*

Mr. *Campbell* and Mr. *Karslake* for the purchaser.—No rule of this Court was better settled, than that a purchaser was entitled to have the identical thing for which he contracted, or he could not be compelled specifically to perform the agreement. In this case the purchaser was entitled to have a simple title to the house No. 7, in lieu of which it was proposed to give him a title involved in the title to No. 6. The purchaser had contracted to accept no such title.

Again, the purchaser contracted to purchase the residue of the lease granted to Mr. Mackenzie; in lieu of which it was proposed to concede to him the security of a lease to be granted by the petitioners to Lord Walsingham. It was idle to contend that Lord Walsingham was as good a tenant as Mr. Mackenzie, because that was not the question before the Court. If Lord Walsingham were a thousand times a more advantageous underlessee, that circumstance would not detract from the purchaser's right to have the thing for which he contracted. He was not bound to accept whatever the vendors chose to offer him, merely because it was equal in value to the subject of his contract. In the case of *Forster* v. *Hoggart*(*a*), for aught that the purchaser could tell, the lessee of No. 6 might have granted underleases, so as to make it impossible to shew a good title in No. 7. It was to be observed, that the purchaser had contracted to buy Mr. Mackenzie's in-

(*a*) 15 Q. B. 155.

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*Argument.*

terest; but it was clear now that that gentleman would have had no defence to an action of ejectment. The title therefore was bad, and would not be forced upon a purchaser.

Mr. *Bacon* and Mr. *Piggott* appeared for the petitioners, but were not called on by his Honour.

*Judgment.*

The VICE-CHANCELLOR:—

I have listened to the arguments of the purchaser's counsel, to see whether they could point out any practical difficulty or injury arising from this mistake, but they have been unable even to suggest any thing of the kind. It has been contended, indeed, that these wrong parcels, having been introduced in the lease of No. 7, the lessee had no interest in the property; but that is clearly an erroneous view of the law. Mr. Mackenzie was in possession, and had a good title, subject to an imperfection, which he was at any time entitled to have had remedied. Then, it has been said, that underleases may have been granted to nobody knows who; but the rightful owner has all along been in the actual possession of the property. The title is clearly good, subject to one defect arising from a mere clerical error, which the the order of the Court has effectually cured. I am of opinion, therefore, that the purchaser is bound to complete his contract, and shall make an order to that effect.

1854.

## BARRETT *v.* RING.

*Jan. 23rd.*

It is no defence to a suit for specific performance against trustees of a turnpike road, that the land they have contracted to sell is liable to pre-emption by the owner of the adjoining land under the General Turnpike Act, 3 Geo. 4, c. 126, s. 39; even where the offer required has not, through inadvertence, been made to such owner, and it is in evidence that the owner insists on his right, the purchaser making no objection to the title, and being content to take such estate as the trustees could convey.

THE plaintiffs, Messrs. Barrett and Watson, are the lessees, under the Corporation of the Sons of the Clergy, of certain lands situate on the south side of the junction turnpike-road from Kentish Town to Upper Holloway, which they had taken for a long term of years for building purposes.

The defendants are the trustees of that road, appointed to put into execution the Acts of Parliament for making the road and managing the affairs relating thereto by divers Acts of Parliament, particularly the 3 & 4 Will. 4, c. c., intituled "An Act for continuing certain powers to the Trustees of the Road from Kentish Town to Upper Holloway, in the County of Middlesex."

A bank or slip of land, of the width of a few feet, between the road and the lands leased to the plaintiffs, was the property of the defendants.

Prior to the date of the contract next mentioned, the plaintiffs commenced the erection of a messuage, part of which they had, in ignorance of the defendants' rights, erected on the bank or slip of land between the lands demised to them and the road, and they used the whole frontage towards the road as their own.

By the General Turnpike Act, 3 Geo. 4, c. 126, s. 67, three trustees of any turnpike trust present at a meeting are authorised to manage the affairs of the trust; and by the 39th section of that Act, the trustees are authorised to sell such parts of the lands vested in them as shall not be wanted for the purposes of the roads, after having first offered the lands to the owners of the adjoining lands, but the refusal of such owners to purchase is to be verified by affidavit, in manner provided by the Act (*a*).

(*a*) By 3 Geo. 4, c. 126, s. 89, it is enacted, "That where the trustees or any commissioners of any turnpike-road shall have

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*Statement.*

Three trustees on behalf of the trustees, and the plaintiffs, on the 11th of August, 1852, entered into a written agreement, whereby, in consideration of 125*l.* to be paid by the plaintiffs to the trustees, the trustees agreed to sell to the plaintiffs all the land on the south side of the junction road, marked out in a plan, being the bank or slip of land between the land of which the plaintiffs were lessees as aforesaid and the road; and the trustees agreed to convey the same land, but were not to deduce title thereto.

After this contract was signed, the plaintiffs, with the privity of the defendants, and in execution of the scheme of building intended to be carried out by them upon the slip of land and the land contiguous thereto demised to them, continued to erect, partly upon the slip of land comprised in that contract, and partly upon the contiguous

purchased, or shall be possessed, of any piece or pieces of ground, not wanted for the purposes of such road, it shall and may be lawful for such trustees or commissioners to sell and dispose of the same: Provided always, that the said trustees or commissioners, before they shall sell and dispose of any such piece or pieces of ground not wanted for the purposes of such turnpike-road as aforesaid to any other person or persons, shall first offer the same to the person or persons of whom the same shall have been purchased, or to the person or persons whose lands shall adjoin thereto: and if such person or persons respectively shall then and thereupon refuse or shall not agree (except with respect to or on account of the price thereof) to purchase the same respectively, on an affidavit being made and sworn before a Master or master extraordinary in the High Court of Chancery, or before one of his Majesty's justices of the peace for the county, liberty, or place where such ground is situate (who are hereby respectively empowered to take such affidavit), by some person or persons no way interested in the said piece or pieces of ground, stating that such offer was made by or on the behalf of such trustees or commissioners, and that such offer was then and thereupon refused, or was not agreed to by the person or persons to whom the same was made, such affidavit shall, in all Courts whatsoever, be sufficient evidence and proof that such offer was made and was refused, or not agreed to, by the person or persons to whom such offer was made, as the case may be."

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land, a large messuage intended for a public-house. This they did upon the faith of the contract of the 11th of August, 1852.

*Statement.*

In consequence of a correspondence, subsequent to the date of the agreement, with the solicitors for the Corporation of the Sons of the Clergy, who claimed to have the slip of land conveyed to them, the defendants declined to convey it.

The plaintiffs, thereupon, instituted this suit, with a prayer for the specific performance of the agreement, in the usual form.

The cause now came on upon a motion for a decree.

*Argument.*

Mr. *Malins* and Mr. *W. D. Lewis*, for the plaintiffs, said that the plaintiffs did not object to the title of the trustees, and were satisfied to take such estate as they could convey to them.

Mr. *Bovill*, for the defendants, objected, first, that the suit was defective for want of parties, because the Corporation of the Sons of the Clergy, the lessors of the plaintiffs, were seised in fee of the lands adjoining to the bank or slip of land in question, of which the plaintiffs were only lessees; and it appeared in evidence that no offer of the land had been made to that Corporation, according to the requisition of the 89th section of the 3 Geo. 4, c. 126, and no evidence of any such offer was before the Court; whilst, from the evidence in the cause, it appeared that the Corporation claimed to be purchasers. And he submitted that a public duty was imposed on the defendants, which they had accidentally overlooked. Under these circumstances, he submitted that the plaintiffs, who must be assumed to be aware of the prohibition as well as the defendants, had no right to the extraordinary interposition of the Court in decreeing specific performance; but that the plaintiffs must be left to obtain such remedy in damages as they could obtain in an action at law.

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*Judgment.*

The VICE-CHANCELLOR said, the defendants who had entered into this contract must be presumed to have entered into it with full knowledge of the prohibition, and it was not competent for them to set up, as an objection specifically to perform their contract, the jus tertii of which they were then cognizant. The plaintiffs had expended money on the faith that the sale to them would be completed, and were satisfied with the defendants' title, and to accept such title as they could convey to them. The sale would be, in effect, subject to whatever right the Corporation of the Sons of the Clergy might, if they were advised to proceed in rem, be able to substantiate against the lands in the possession of the plaintiffs as purchasers; and if the Corporation should think fit to proceed against the trustees for damages, it might do so; and it was not for this Court to provide against any such consequence to the defendants of the specific performance of their agreement. The decree must be for specific performance, with costs.

*Jan. 20th.*

IN THE MATTER OF CLOSSEY.

There being no satisfactory proof that the persons were living for whose lives certain hereditaments were held, the Court, on the application of the remainderman, made an order under the 6 Anne, c. 18, s. 1, requiring the tenant pur autre vie to produce the persons in question at a time and place specified in the order.

THIS was a motion under the 6 Anne, c. 18, intitled "An Act for the more effectual Discovery of the Death of Persons pretended to be alive, to the prejudice of those who claim Estates after their Death."

The form of the motion was as follows:—"That the said William Byrne be ordered, on the 1st day of February next, provided the order of this Court for that purpose be served upon him ten clear days previously, to produce and shew—at the door of the parish church of St. Peter, in Liverpool, between the hours of eleven in the forenoon and one in the afternoon, to Malcolm M'Eachan, of Liverpool, cork merchant, and Thomas Dobell, of Liverpool—Elizabeth Clossey widow, Jane Ann Galway, and Elizabeth Ann Galway, the persons named in the lease of the 30th of November, 1791, or one or more of them."

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*In re* CLOSSEY.

Mr. *Cairns*, for the motion, stated the facts as they appeared on affidavit.—In June, 1849, a Mr. William Johnson, of Liverpool, purchased at a sale by auction, in Parkgate, in Cheshire, a house and offices in the same town. In the particulars of sale the property was described to be occupied by a Miss Storer, claimed to be in lease for one life, then sixty years of age; but no evidence of the lease was in the possession of the vendor. Subject to the existence of the said lease, dated 30th of November, 1791, the house and premises were conveyed to the purchaser. In July, 1852, it appeared that a Mr. Whitehead was in possession, upon whom Mr. Johnson served a notice, dated the 27th of July, requiring him for the future to pay him the rent, inasmuch as he had applied to Mr. William Byrne, of 7, Shoe-lane, Dublin, bone merchant, who claimed to be tenant of the house pur autre vie, for proof that the said life was in being; but that Mr. Byrne, having returned no reply to such application, it was to be presumed that the life had dropped. Mr. Byrne, however, threatened to distrain for the rent due in September, 1852; upon which it was paid to his agent by Mr. Whitehead. On the 5th of August, 1853, Mr. Johnson caused a notice to be served on Byrne, requiring evidence that the life was in being, and to be informed of his or her address within a month. On the 3rd of November, 1853, Byrne wrote to the purchaser's solicitor informing him that he had reason to believe the persons for whose lives he was entitled to hold the property in question were living, and resident in England; but that, if it could be shewn that they were dead, he would readily surrender the property. In September, 1853, the rent was again paid to Byrne's agent. Under these circumstances the present application was made to the Court. A similar order had been made in *Re Lingen* (*a*).

*Argument.*

The VICE-CHANCELLOR directed the order to be made in the form mentioned in that case.

*Judgment.*

(*a*) 12 Sim. 104.

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*Jan. 23rd.*

## JORTIN *v.* THE SOUTH EASTERN RAILWAY COMPANY.

A harbour company having granted several mortgages of the harbour and buildings, rates, and duties under their Act, afterwards applied to the Exchequer Loan Commissioners for an advance. The Commissioners advanced money upon a mortgage of the harbour and duties, the prior mortgagees in a memorandum of the same date conceding to the Commissioners a qualified priority as to the rates and duties only, without any mention of the buildings. The principal and interest being in arrear, the Commissioners, under their Acts, took possession, and subsequently sold the whole property of the Harbour Company, including the buildings and harbour, to the defendants. Upon a bill filed by a prior mortgagee, who had signed the memorandum: *Held*, that the purchasers took subject to the rights of the plaintiff, except so far as they were varied by the memorandum.

BY an Act of the 47 Geo. 3, c. ii., (1807), intitled "An Act for constructing a Pier and Harbour at or near the Town of Folkestone, in the County of Kent," certain persons were created a company and body corporate, with a common seal, for carrying into effect the purposes of the Act. By sect. 2, it was provided, that it should be lawful for the said company to raise and contribute monies not exceeding 22,000*l.*, which were to be divided into 50*l.* shares, upon which they were to receive a proportionate part of the profits that might arise and accrue by the rates and duties and other monies to be raised under the authority of the said Act, with power to not less than three-fourths of the company to create 150 new shares. The Act then went on to provide for the general management of the affairs of the company, for the appointment of proper officers, for holding of meetings, &c.

By the 23rd section, it was enacted, That in case the said company of proprietors shall deem it expedient to borrow money for the purpose of enabling them to carry on the works aforesaid, it shall and may be lawful to and for them, and they are hereby authorised and empowered, from time to time to borrow and take up at interest on the credit of the rates and duties of the said harbour, any sum or sums of money which they shall deem necessary for effectuating the purposes of this Act not exceeding 8000*l.*; and to demise, grant, bargain, and sell the property of the said harbour, and the capital stock therein, and the tolls, rents(*a*), and duties arising or to arise to the said

(*a*) *Sic in orig.*

company of proprietors, by virtue of this Act, (the costs and charges of preparing such demise or demises to be paid out of such tolls, rates, and duties) as a security for any sum or sums of money which shall be so borrowed, with interest, to such person or persons, or to his, her, or their trustee or trustees, who shall advance or lend the same, which said demise or demises shall be made and granted under the seal of the said company, and in the name and style of the said company, signed by the chairman of the said directors present at the meeting at which the said money shall be borrowed, and may be in the form or to the effect set out in the Act.

By the 24th section a form was provided for the transfer of mortgages made under the Act, which (sect. 25) were directed to be entered in the books of the company. The 26th section provided, that the interest of money raised or borrowed under the Act should be paid to the person or persons entitled to receive the same prior to the making of any dividend to the proprietors. The Act further provided a scale of rates and duties to be paid upon vessels and articles entering or leaving the said harbour.

Between the 14th of October, 1812, and the 16th of March, 1818, the company, under the authority of their Act, borrowed about 4083*l.*, in small sums varying from 15*l.* to 235*l.*, and secured each loan with interest at 5*l.* per cent., by a mortgage in the following terms, which was the form provided by the Act, with the addition of the words in italics.

"By virtue of an Act of Parliament made in the 47th year of his Majesty King George the 3rd, intituled 'An Act for Constructing a Pier or Harbour at or near the Town of Folkestone, in the County of Kent,' We, the Folkestone Harbour Company, incorporated by and under the said Act, in consideration of the sum of 50*l.* advanced and paid to us by Richard Hart, of the town of Folkestone, gentleman, and in consideration of the sum of 50*l.* ad-

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*Statement.*

vanced and paid to us by John Hart, gentleman, making together the sum of 100*l.*, do hereby demise, grant, bargain, and sell unto the said Richard Hart and John Hart, their executors, administrators, and assigns, *such proportion of* the aforesaid harbour and buildings belonging thereunto, and *also such proportion of* all and singular the rates, rents, and duties payable by virtue of the said Act, and all our right, title, and interest of, in, and to the same *respectively, as the said several sums of* 50*l.* *and* 50*l.*, *making together* 100*l.*, *do or shall bear to the whole advanced or to be advanced on the credit of the said Act, which, in pursuance of and conformity to the said Act, shall not exceed, in the whole, the sum of* 8000*l.*, to be holden by the said Richard Hart and John Hart respectively, and to their several respective executors, administrators, and assigns, from the 26th of October, until the said several sums of 50*l.* and 50*l.*, with interest for the same, at and after the rate of 5*l.* per cent. for 100*l.* for a year, free and clear from all deductions for property tax or any other taxes or deductions whatsoever, shall be fully satisfied and paid. In witness whereof, we have to these presents caused our seal, name, and style to be put, the 14th day of October, 1812."

By the 58 Geo. 3, c. 21, the former Act was amended, and power given to the company to borrow and take up at interest, on the credit of the rates and duties of the said harbour, any sum or sums necessary for effectuating the purpose of the Act, not exceeding 20,000*l.*, over and above the sum they were empowered to raise by the first-recited Act, and to demise, grant, bargain, and sell the property of the said harbour, and the capital stock therein, and the tolls, rents, and duties arising or to arise to the said company by virtue of this Act, (the costs and charges of preparing and perfecting such demise and demises to be paid out of such tolls, and dues, and duties,) as a security for any sum or sums of money which shall be so borrowed, with interest, to such person or persons, or to his, her, or their

trustee or trustees, who shall advance and lend the same, in the same manner and under the same regulations as are in the said recited Act contained in respect of the sum of money therein authorised to be raised by way of mortgage.

The company, being desirous of raising the further sum of 10,000*l.* under the last-mentioned Acts, in the early part of 1818, applied to the Exchequer Loan Commissioners to advance that amount, upon the security, not only of the tolls and duties, but also of the harbour and works; which, by the 9th section of their amended Act, 57 Geo. 3, c. 124, the Commissioners had power to take in mortgage. The Commissioners agreed to make the advance upon certain conditions, which were embodied in a memorandum of the same date as the deed, viz. the 15th of April, 1818. By that instrument, between the proprietors, of the one part, and the secretary of the Exchequer Loan Commissioners, under the 57 Geo. 3, c. 34, of the other part, it was witnessed, "that, in consideration that the Commissioners, in pursuance of their Acts or one of them, have advanced, by their secretary, to the Folkestone Harbour Company and their treasurer for the time being the sum of 10,000*l.* in Exchequer Bills of the same date, made and payable the 10th of October, 1820, they, the company, in pursuance of their Acts enabling them in that behalf, did assign to the said William Holden all and singular the rates, duties, and receipts whatsoever then payable, or which might at any time thereafter become payable to them the said company, by virtue of the said Acts of the 47th and 58th years of the reign of his then present Majesty, and the right to the interest of them the said company of and in the same, and all freehold and leasehold messuages, lands, tenements, and hereditaments belonging to the said company, To hold the same unto and by the said William Holden, his heirs, executors, administrators, and assigns, according to the nature and quality of the same premises respectively, but subject to the proviso for redemption

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thereinafter contained, that, if the said Harbour Company should pay, or cause to be paid, on the 15th day of April in every year, for the term of three years next ensuing from the date of the indenture now being stated, to the said William Holden or other the secretary for the time being of the said Commissioners for the issue of Exchequer Bills, the sum of 500*l.* as and for interest for the sum of 10,000*l.*, at the rate of 5*l.* per cent. per annum, to be computed from the day of the said indenture now being stated; and should from and after the expiration of the said term of three years pay on the 15th day of April, in every succeeding year, to the said William Holden, or other the secretary for the time being of the said Commissioners for the issue of Exchequer Bills, interest at the rate aforesaid on such parts of the said principal sum of 10,000*l.* as should from time to time remain due from the said Folkestone Harbour Company, together with the further sum of 600*l.* in or towards the discharge of the said principal sum of 10,000*l.*, until the whole of the said principal sum of 10,000*l.* and the interest thereof should be discharged, then and in that case, or on any other acceptance of the said sum of 10,000*l.*, and the interest thereof, by the said Commissioners for the issue of Exchequer Bills, the assignment thereby made as aforesaid should become absolutely void."

On the occasion of the execution of the deed above given, the following memorandum, signed by the mortgagees and creditors of the company, was executed, for the purpose of settling the priorities, under the 22nd and 23rd sections of the 57 Geo. 3, c. 34 (*a*):—

(*a*) Sect. 22 enacts, "That in all cases of assistance afforded by the loan or advance of any bills or money under the provisions of this Act, for the carrying on of any such public works, collieries, or mines, the several commissioners for the execution of this Act shall, in addition to the security required to be taken from the persons applying for such assistance, require and take

"Whereas the Commissioners for the issue of certain Exchequer Bills, under the Act of the 57th Geo. 3, c. 34, and

mortgages, assignments, or other competent security upon the rates, tolls, and receipts accruing, or which may at any time thereafter accrue, arise, or be taken, collected, or received, by or for the use of the body corporate or politic, or company of proprietors or persons interested in the public work, in respect or in aid of which the advance of bills or money under this Act shall have been made, for the securing the repayment of the full amount of bills or money advanced, together with all the interest which may arise and become due upon such amount; and it shall be lawful for any such body corporate or politic, or for the company of proprietors to whom any such public work shall belong, or for the respective trustees, commissioners, committees of management, or other persons, by whatever name or names called, under whose care, management, or control any such public work shall be, to mortgage, assign, and secure such rates, tolls, or receipts to the secretary of the said commissioners respectively, in such manner as shall be required by the said commissioners respectively, and also to any person or persons who shall have become security for any advances made under the provisions of this Act, as a collateral security to the person or persons who shall have entered into any such security for the due and full payment of the full amount of all bills or money so advanced, together with interest thereon, according to the provisions of this Act; and all such mortgages, heritable bonds, assignments, and other securities, shall have priority over and shall precede all other securities, and all dividends and divisions of profit or interest upon any sums advanced or contributed, or which may thereafter be advanced or contributed for the carrying on or completing of any such public work, save and except such sums as shall have been advanced by way of loan before the advance of such bills or money by any persons as bonâ fide creditors, and entitled as such to the repayment of the principal money advanced by them, as well as interest thereon, anything contaiaed in any Act or Acts of Parliament relating to any such public work, in aid or in respect of which any such bills or money shall have been advanced under the provisions of this Act to the contrary in anywise notwithstanding."

Sect. 23 provides, "That in every case in which four-fifth parts in amount or value of the creditors who have securities of a like nature upon the rates, tolls, or receipts arising out of any public work, in aid or in respect of which any application shall be made for the ad-

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another Act of the same session amending the said Act, have consented to advance and lend the Folkestone Harbour Company, incorporated by an Act of Parliament made and passed in the 47th year of his present Majesty, intituled 'An Act for constructing a Pier and Harbour at or near the Town of Folkestone, in the County of Kent,' amended by an Act made and passed in this present session of Parliament, intituled 'An Act for altering and amending an Act passed in the 47th year of his present Majesty, for constructing a Pier and Harbour at or near the Town of Folkestone, in the County of Kent, for varying the Limits, and improving and rendering more commodious the said Pier and Harbour, for raising a further Sum of Money for completing the same, and for extending the Powers and Provisions of the said Act,' the sum of 10,000*l.* in Exchequer bills, to be applied in completing the said harbour, and to be secured by a mortgage of the rates, duties, and receipts now payable, or which may hereafter become payable under and by virtue of the said last-mentioned Acts: Now these presents witness, that we, whose names are

vance of bills or money under the provisions of this Act, shall agree and signify their consent in writing that a priority over their claims as such creditors shall be given to the commissioners for the purposes of this Act, or to any persons who have applied for such assistance, in respect of such advance, then and in such case the mortgage, assignment, or other security given by the body politic or corporate, or company of proprietors, or persons interested in any such public work, to the secretary of such commissioners respectively, and to the person or persons upon whose personal security such advance of bills under this Act shall have been made, shall have priority over the claims of all the creditors of a like description, as well such creditors as have not agreed or assented to such priority as to those who have so agreed as aforesaid, anything contained in any Act or Acts of Parliament relating to any such public work as aforesaid, or any thing contained in any mortgage, assignment, or other security upon such rates, tolls, or receipts given to any such creditors to the contrary notwithstanding.

hereinunder subscribed, being the present mortgagees or creditors of the Folkestone Harbour Company, who have respectively and bonâ fide advanced money by way of loan to the said Folkestone Harbour Company, upon the several securities now held by us and each of us respectively, or to which we or any or either of us may be entitled in consequence of any advances so made or agreed to be made by us or any or either of us as aforesaid, do hereby severally and respectively consent and agree that any mortgage or other security which shall be taken by the said Commissioners in the name of their secretary for the time being, or otherwise, of the rates, duties, and receipts of the said Harbour Company, to secure the repayment of the said loan of 10,000*l.* and interest in the manner specified in such mortgage or mortgages, shall have priority over the respective securities now held or hereafter to be held by us or by any or either of us, in manner following, that is to say, that the said Commissioners shall, in the first place, be annually paid out of the said rates, duties, and receipts, interest at the rate of 5*l.* per cent. per annum on the said sum of 10,000*l.*, or upon such part thereof as shall from time to time remain due and unpaid; and, in the next place, that we whose names are hereunto subscribed shall be annually paid out of such rates, duties, and receipts, such interest as may, from the date of the said mortgage to the secretary of the said Commissioners, become due to us respectively by virtue of the respective securities now held by us, or to which we or any or either of us may be entitled as aforesaid; and after such respective payments of interest as aforesaid, the surplus of the said rates, duties, and receipts shall be applied in the discharge of the said principal sum of 10,000*l.*, at such periods and in such proportions as shall be specified in the mortgage to the secretary of the said Commissioners, until the whole of the said sum of 10,000*l.* shall be repaid, in preference to and with priority over all claims and demands whatsoever which

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we, or any or either of us, may have to the repayment of the several principal sums of money advanced by each of us respectively, anything contained in the said last-mentioned Acts, or in any mortgage, assignment, or other security now held by us, or any or either of us respectively, or to which we or any or either of us may be entitled, upon such rates, duties, and receipts, to the contrary thereof notwithstanding."

Subsequently to the date of the above memorandum several of the mortgages of prior date to that of the Exchequer Loan Commissioners, to the extent of 1600*l.*, were transferred to Mr. Jortin in the manner prescribed by the Act, and the transfer thereof was duly registered. All the creditors who transferred their debt had signed the memorandum above given, with the exception of Messrs. Richard and John Hart, who transferred their rights to Mr. Jortin on the 30th of May, 1820. Besides the creditors who signed the memorandum, others, to the extent of 2000*l.*, consented to give to the Commissioners an absolute priority over all claims and demands. From 1821 to 1831, no interest had been paid on the bonds. On the 5th of February, 1831, James Bond, the clerk to the company, addressed the following letter to Mr. Jortin.

Folkestone, 5th February, 1831.

Sir—Observing you to be a large holder of Folkestone Harbour mortgages, I take the liberty of informing you that a very strong memorial of the company, praying for public aid towards completing the harbour, has been presented to the Lords of the Admiralty, and by them forwarded to the Treasury. If you or any friend of yours have any influence with the present Government, I need hardly suggest to you that you would be consulting your own interest in making use of such influence, by every means in

your power, towards furthering the object of the memorial. —I am, Sir, your obedient servant,

JOHN JAMES BOND,
Clerk to the Company.

JOHN JORTIN, Esq.

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On the 22nd of April, 1833, Mr. Jortin wrote to the treasurer of the company, stating, that he was a considerable holder of Folkestone Harbour bonds since 1821, and complaining that no interest had been paid thereon. On the 24th of April, 1833, Mr. Stace, the treasurer of the company, addressed the following letter to Mr. Jortin:—

"Dear Sir—I duly received your favour of the 22nd, but I am very sorry that I am not able to give you a good account of the state of the Folkestone Harbour concern. No interest has been paid since 1821 to the Government, nor to any one that holds securities, nor is it likely while matters remain as they now are. The income of the harbour leaves a very small surplus, after the expense of management and the necessary repairs are paid. By an audited account passed this month, the difference between the receipts and the outlay was only 25*l.* 19*s.* 3¼*d.* About two years since we had six or eight memorials presented to the Government from the principal persons of the north of England to the Western Ports, all setting forth the vast public utility that would arise from the completion of Folkestone Harbour. Those memorials were very favourably received, and we fully expected that we should eventually succeed; but at present they are lying within the Treasury, not answered, nor are they refused. What a future day may produce is quite uncertain; but, as an individual, I have some ground to think we may yet see better days. At present, our principal income arises from vessels belonging to the town bringing coal, shop goods, &c., and the fishery, which has for several years been on the decline. I am at all times willing and happy to give

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you or any other gentleman that has embarked property in the present important undertaking, any information I am able and you require.—I am, Sir, yours truly,

"JOHN JORTIN, Esq. W. STACE."

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On the 28th of March, 1839, Benjamin Harrison, George Cathery, and Thomas Vigne, three of the Exchequer Loan Commissioners, (the sum of 18,500*l.*, principal and interest, being then due upon the loan of 10,000*l.*,) issued their warrant to their then secretary, to take possession of the rates, duties, and receipts payable under the Act, and the freehold and leasehold messuages, lands, tenements, and hereditaments belonging to the company, which had been assigned to the late secretary as a security for the monies advanced. The warrant was executed on the 3rd of April, 1839, and the annual profits applied thenceforth in reduction of the current interest until the 21st of April, 1843, at which date the debt due to the Commissioners for principal and interest on the loan amounted to 18,045*l.* 17*s.* 7*d.*

By a deed, dated the 21st of April, 1843, between Benjamin Harrison, George Hathorn, and Joseph Reid, Esqrs., three of the Commissioners under the Acts for the issue of Exchequer Bills by way of loan in aid of public works, of the first part; J. B. Brickwood, their then secretary, of the second part; and Joseph Baxendale, W. P. Richards, and Lewis Cubitt, of the third part; and R. Davis and William Chrystie of the fourth part; the harbour and works, tolls, rates, and hereditaments comprised in the mortgage were assigned over by the said Commissioners and by their secretary to the said J. Baxendale, William P. Richards, and L. Cubitt, their heirs, administrators, and assigns, for ever, in consideration of the sum of 18,000*l.* thereby acknowledged to be received by the said Commissioners. By the same deed, with the privity of the purchasers, the Commissioners assigned, and so far as they lawfully could, releas-

ed to the said Richard Davis and William Chrystie, their executors, administrators, and assigns, the said sum of 10,000*l.*, so secured as therein mentioned, and the arrears of interest, or so much of the said principal and interest as 18,000*l.* would extend to satisfy.

The deed of sale and assignment recited the several Acts of Parliament under which the Commissioners were empowered to make loans, and take securities, and effect sales.

The purchasers from the Commissioners were trustees for the South Eastern Railway, to whom, an Act of Parliament having been obtained for that purpose, the property was conveyed on the 11th of July, 1843, and by them converted, so as to be used in connexion with their railway.

On the 7th of April, 1843, Mr. Jortin made his will, by which he bequeathed the whole of his personal estate to the plaintiff, and died on the 21st of May in the same year. His will was duly proved by his executors. The plaintiff shortly afterwards made frequent application to the railway company to come to an account of the rents and profits of the harbour, &c., which they refused. She filed her bill against the company on the 6th of January, 1848.

The bill alleged that the plaintiff's title, to the extent of her securities, was paramount to that of the company; and it prayed that it might be declared that the plaintiff was entitled to a charge on the said Folkestone Harbour and buildings belonging thereunto, and the rates, duties, and annual produce arising and to arise therefrom; and that the South Eastern Railway Company ought in each year to have applied the income of the said harbour and buildings, including a proper sum to be ascertained and accounted for in respect of so much of their railway as had been constructed on the said premises purchased by them, first, in payment of interest accrued due in each year on the said sum of 10,000*l.*, or so much thereof as remained owing for the time being, and next, towards payment of

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the interest accrued to the plaintiff in each year in respect of the said sum of 1600*l.*, and to have applied the surplus, if any, of such income in payment of the said sum of 10,000*l.*, or so much as remained due; and that the necessary accounts might be taken, to ascertain what ought to have been so applied; and that the company might be decreed to pay what it should be found ought to have been applied by them in payment of the plaintiff's interest; and for the appointment of a receiver; and, subject thereto, in payment of the said sum of 1600*l.*; and that in default of payment to the plaintiff within a time to be appointed, being after the whole sum of 10,000*l.* shall have been discharged, in case any sum shall remain due to the plaintiff, that the said harbour and buildings might be sold.

The defendants put in their answer to the bill, admitting the facts above given, and insisting, that, by the sale from the Commissioners, the property was discharged from every incumbrance. The answer also claimed the benefit of the Statute of Limitations.

*Argument.*

Mr. *J. Baily* and Mr. *C. Hall* for the bill.—It is not denied that the plaintiff's securities are prior in date to the mortgage to the Commissioners, and they are therefore entitled as a matter of course to priority, unless there be something to defeat that right. Two grounds are relied on as cutting down what it is admitted would be otherwise the paramount title of the plaintiff. *First*, that, by the memorandum of the 15th of April, 1818, the plaintiff, or the person through whom she claims, conceded to the Commissioners an absolute priority. That instrument was executed in conformity with the 23rd section of the 57 Geo. 3, c. 34, which provides, that if four-fifths of the creditors agree, and signify their consent in writing, priority over their claims shall be given to the Commissioners, the monies advanced by the latter shall be a prior claim. It is clear, therefore, that any priority

which the Commissioners had under the memorandum is limited to the extent to which in that instrument it has been conceded by the creditors. Now the words used are these:—"That the creditors do hereby consent and agree, that any mortgage or other security which shall be taken by the said Commissioners of the *rates, duties, and receipts* of the said company to secure the said loan, shall have priority." These words give no priority to the Commissioners in respect of the *harbour, land, and buildings.* So far therefore as the memorandum alters the position of the parties, the plaintiff's title is still paramount to that of the defendants, as respects the land, harbour, and buildings. *Secondly,* it is contended, that, under the Acts constituting and amending the commission, power is given to the Commissioners to take possession of and sell property mortgaged to them, so as to defeat the rights of prior mortgagees; but a power so unusual and extraordinary could only be given by express words, which were not to be found in any of the Acts (*a*). The Commissioners were

(*a*) The power of sale was first given by 1 Geo. 3, c. 60, s. 19:—"And be it further enacted, That, if any default shall be made in the repayment (but not otherwise) of all or any part of any loan or advance which has been or shall be secured to the said commissioners, in part or in the whole, by any mortgage or assignment of any interest, property, or effects whatsoever (real or personal), it shall and may be lawful for the said commissioners, or such person or persons as shall be nominated and appointed by any three or more of them in writing, to take possession of all or any parts or part of such mortgaged or assigned interest, property, or effects, by sale or mortgage of the same or a competent part thereof to raise or levy such sum or sums of money as shall be sufficient to repay all monies due upon or in respect of such loan or advance and the interest thereof, and all costs and charges attending such proceedings; and the monies so recovered (the costs and charges aforesaid excepted,) shall be paid and applied in the reimbursement and satisfaction of the sum due upon or in respect of such loan or advance, in like manner as the sums of money to be recovered under the proceedings authorised by the said recited Acts, in default of payment, are there-

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no doubt empowered to sell, but such sale must of course be made subject to the rights of prior incumbrancers.

by directed to be paid and applied; and the receipt of such persons or person as the said commissioners or any three or more of them shall nominate and appoint as aforesaid, shall alone be a full and sufficient discharge to such mortgagees or purchasers, or mortgagee or purchaser, for the monies or money advanced on mortgage, or for the purchase-monies or purchase-money of the respective interest, property, or effects so mortgaged or sold; and such mortgagees or purchasers, or mortgagee or purchaser, shall not be bound to see to the application thereof, nor shall be liable or in any manner accountable for the misapplication or non-application of such monies or money by the persons or person appointed by the said commissioners as aforesaid, or any part of them."

The following outline of the powers, remedies, and priorities, given to the Commissioners by the various Acts may be found useful:—

POWERS: By the first Act (57 Geo. 3, c. 34), the commissioners could only take personal security, and mortgages of the rates, duties, and tolls, as a security for the loan made: ss. 20, 22. By the 57 Geo. 3, c. 124, s. 9, they were empowered to take a mortgage or assignment of freehold, copyhold, or leasehold property, as a security for advances made under the Act. Sect. 10 allowed them to take heritable securities on estates in Scotland and assignments thereof; and (sect. 11) deposits of India bonds, exchequer bills, bills of exchange, and negotiable securities. (These enactments are repeated by the 3 Geo. 4, c. 86, ss. 27, 28, 29). By the 3 Geo. 4, c. 86, s. 15, the loan was authorised in certain cases by a bond to the sovereign; and, by sect. 16, personal security was in certain cases dispensed with. By sect. 17, the commissioners were authorised to take mortgages of public works, even in case they were not in receipt of tolls: sect. 19. By the 5 Vict. (sess. 2) c. 9, the commissioners were authorised (sect. 11) to make advances to persons for the purpose of carrying on public works; and (sect. 12) to persons authorised to borrow under the 1 & 2 Vict. c. 56.

REMEDIES: Under the 57 Geo. 3, c. 34, the commissioners, in default of payment, might proceed against persons having given security: sect. 41. By the 1 Geo. 4, c. 60, s. 19, in default of payment, might sell the securities, real or personal. By the 3 Geo. 4, c. 86, s. 25, reciting that doubts had arisen whether corporate rights became vested in the commissioners on a mortgage, it was enacted, That, upon a sale, the commissioners might convey &c. all such rights, title, &c. By sect. 24 of the same Act, the

Then, it will be said, that the Statute of Limitations defeats the plaintiff's claim. But Mr. Jortin's right was

commissioners, in default of payment or of raising tolls, were authorised to take possession of the tolls and toll-gates. By the 1 & 2 Will. 4, c. 24, s. 21, the commissioners, in default of payment of the whole or part of such loan or of the interest, might take possession of mortgaged property and sell the same. By 1 & 2 Vict. (sess. 2) c. 9, s. 16, they might grant leases, or (sect. 18) concur in leases of the mortgaged property. By sect. 19, upon a sale, they might retain for the whole of their debt and interest out of purchase-monies, although some of the instalments may not be due at the date of the sale. By sect. 20, it is declared, that the property sold shall be held freed and discharged from all claim and demand of the mortgagees and persons claiming under them, and they shall be precluded from the equity of redemption, provided that nothing in the Act contained should prejudice the right of any persons as against the commissioners in respect to the surplus of the monies arising from the dealing of the commissioners with the property. By sect. 21, the commissioners, in the event of the works turning out unproductive, were authorised to sell the materials, sites, &c.

PRIORITIES.—By the 57 Geo. 3, c. 34, s. 22, mortgages to the commissioners shall have priority over and precede all other securities, dividends, profits, and interest on all sums contributed for such public works, save and except such sums as shall have been advanced by way of loan (before the advance of the commissioners) by bonâ fide creditors; provided, by sect. 23, that if four-fifths in value of creditors who have securities or the like on rates, tolls, or receipts, shall signify their consent in writing that a priority shall be given to the commissioners, then they shall have such priority, &c.* By the 3 Geo. 4, c. 86, s. 17, *mortgages of public works*, assignments, and other securities made to the commissioners, priority is given over and precedes all other securities, dividends, and interests, and all sums contributed for such public works, save and except such sums as have been advanced by way of loan, before the advance of the commissioners, by bonâ fide creditors, &c. The 18th section then provides, that, by consent in writing, four-fifths of the creditors may give priority to the commissioners. These sections, it would seem, only vary the provisions of the 57 Geo. 3, c. 34, ss. 22, 23, so far as they exclude mortgages of the *works*, which, at the date of the first Act, the commissioners had no power to accept as security. Then followed the 1 & 2 Will. 4, c. 24, s. 20, which authorised the concession

* See ante, pp. 52, 53, note.

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*Argument.*

admitted by the secretary in 1831, and the bill was filed in 1848—a period less than twenty years, and therefore not within the statute.

Mr. *Wigram*, Mr. *Malins*, and Mr. *Pole*, for the defendants.—Supposing the plaintiff were to succeed in establishing her right to a charge upon the harbour and works, such charge would be nevertheless subject to the amount expended by the defendants in permanent improvements: *Miller* v. *Beaty* (*a*), *Quarrell* v. *Beckford* (*b*); which would

to the commissioners of priority in respect of the interest as well as principal of money advanced by them.

Sect. 20. "And whereas doubts have arisen as to the extent of the priority of mortgages, assignments, or other securities taken by the commissioners for advances made under the authority of the said recited Acts, for remedy whereof, be it declared and enacted, That, in all cases where such mortgages, assignments, or other securities shall have been or shall be taken by the said commissioners as aforesaid, for securing the repayment of any loan, whether of bills or money, under the said recited Acts or any of them, or this Act, all such mortgages, assignments, and other securities have and shall have priority over and precede all other liabilities, claims, and securities whatsoever chargeable on the property included in such mortgages, assignments, or other securities, and all dividends, and division of profit, or interest upon any sums advanced or contributed, or which shall or may thereafter have been advanced or contributed for the carrying on or completing of any such public work, road, railway, or drainage, save and except only such sums as shall have been advanced by way of loan before the advance of such bills or money, and for securing of which said previous advances, mortgages, assignments, or other securities shall have been given and executed to any person or persons bonâ fide creditors, and entitled as such to the repayment of the principal money advanced by them, as well as interest thereon; anything contained in any Act or Acts of Parliament relating or which may hereafter relate to any such public work, road, railway, or drainage, in aid or in respect of which any such Exchequer Bills or money shall have been or shall be advanced under the provisions of the said recited Acts or any of them, or this Act, to the contrary in anywise notwithstanding."

By the 57 Geo. 3, c. 34, s. 43, and 57 Geo. 3, c. 124, s. 7, in case of bankruptcy of securities, the commissioners are given an absolute priority over the other creditors.

(*a*) Seton on Decrees, p. 153.

(*b*) 14 Ves. 179 (judgment).

in this case absorb the whole property, except as in connexion with the railway. The result would be, therefore, that, on taking the accounts, the receipts would be found insufficient to cover the defendants' claims. But, secondly, by the 40th section of the 3 & 4 Will 4, c. 27, it was enacted that no suit should be brought for the recovery of land unless there was some acknowledgment in writing given to the creditor and to the debtor, within twenty years next before the suit was commenced. Here the plaintiff's title accrued partly in 1812, partly in 1820, and the bill was not filed until 1848, being a period of from twenty-eight to thirty-six years. The letter relied on was written not by the company but by their vendor, and would not bind the purchaser. On this ground it was submitted that the plaintiff's case must fail.

Again, if the claim made on the bill was conceded, the plaintiff had clearly no locus standi in this Court. Her right, if any, was a purely legal one. She was the holder of what is called a "Welch mortgage," and her remedy was in a Court of law. The position of the Commissioners was analogous to that of a second mortgagee with a power of sale, in which, if the power be properly exercised, the title of a purchaser under it is good against all the world. Here the sale itself is not impeached for inadequacy of price or otherwise. It may be, that the plaintiff is entitled to attach the fund in the hands of the Commissioners; but she has clearly no right as against bonâ fide purchasers under a parliamentary power of sale. By the earlier Acts, the powers of the Commissioners were limited; but they were subsequently extended by the legislature for the sake of public advantage, both as to the nature of the securities to be taken and the right to deal with those securities, and the priorities conceded to them. Thus, by the first Act, the Commissioners could only advance loans on personal security, or on that of tolls, rates, duties, &c.; but, by subsequent Acts, the loans were authorised to be made on

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any species of real and personal property and security. At first, in default of payment, the Commissioners could only proceed against the debtor, without realising the security, and could only acquire priority by the consent of a specified proportion of the prior creditors. But, then came the 19th section of 1 Geo. 4, c. 60, which empowered the Commissioners to sell their security, without introducing any clause to preserve the rights of prior incumbrancers. This was not inequitable, because, at the time when loans were made by the Commissioners, the works for which the monies were required were generally unproductive, and could only be made profitable by means of the loan. Under these circumstances, it was submitted, that, upon the sale, the property was discharged of every incumbrance.

*Argument.*

Mr. *Bailey* was not called on to reply.

*Judgment.*

The VICE-CHANCELLOR:—

The plaintiff is holder of mortgage bonds upon the land and buildings, as well as upon the rates and dues, which, under the Act of 57 Geo. 3, c. 34, were the property of the Folkestone Harbour Company. Of the priority (independently of any subsequent contract) of the plaintiff's rights as mortgagee over those acquired by the Exchequer Loan Commissioners under a subsequent loan by them, there is no doubt. But it is said, that, by a contract between the Commissioners and the plaintiff, or those under whom the plaintiff claims, that priority is lost. The material question is, whether, upon the true construction of the contract with reference to priority, made between the plaintiff and the Commissioners in 1818, and upon the true construction of the subsequent Acts, the Commissioners had it in their power to extinguish the rights of the present plaintiff as against any purchaser of the mortgaged property. If, as is contended on behalf of the defendants,

who are the purchasers from the Commissioners, they acquired a right to the property free from all liability to the claim of any prior mortgagee, of course the plaintiff's case must entirely fail. Notwithstanding the obscurity of the language in some of the Acts, it seems to me very clear, that the right of the plaintiff has not been extinguished; and that, upon the whole, with reference to the defendants, who are the purchasers from the Exchequer Loan Commissioners, the rights of the plaintiff stand exactly in the same situation as if the sale had not been effected. The right of the Exchequer Loan Commissioners accrued in the year 1818, by virtue of the Act of the previous session, and the right of the plaintiff about six years previously. The Act of 1817, under which the Exchequer Loan Commissioners advanced the 10,000*l.*, evidently contemplates the advance of money subject to the rights of prior mortgagees, because the 23rd section of the Act provides, that, with the consent of four-fifths of the prior mortgagees, their rights may be postponed to that of the Exchequer Loan Commissioners. Accordingly, the memorandum, bearing the same date as that of the mortgage, was executed by four-fifths of the then mortgagees holding prior securities. There is not much doubt as to the construction of that memorandum. The security of the prior mortgagees included, first of all, the harbour and buildings, and then, by separate words, the rates and dues to be levied by the Harbour Company. The security taken by the Loan Commissioners also extended, not only to the rates and duties, but also to all the messuages and buildings, and land and property belonging to the company, and therefore contains language as large, with reference to the harbour and buildings, as that of the prior mortgages. But the memorandum, in defining the priority to be given to the Commissioners, excludes all mention of the harbour and buildings, and refers only to a priority in the application of the accruing rates and harbour dues. This is per-

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*Judgment.*

fectly plain on the construction of the instrument, and was a very reasonable arrangement; because the more important consideration for both sets of creditors, viz. the Commissioners and the prior creditors, was the extinguishment of the interest. By that memorandum it is provided, that, notwithstanding the prior rights of the plaintiff, the rates and harbour dues were to be applied first in payment of the interest on the money advanced by the Commissioners; in the second place, in payment of the interest on the prior mortgages; thirdly, towards the extinguishment of the principal due to the Commissioners: and, lastly, in payment of the principal monies due on the prior mortgages.

The argument in this case has been chiefly maintained, by treating the subsequent dealings of the Commissioners by way of sale, as if they had been selling property under a power of sale contained in an ordinary mortgage deed; and by analogy to the provisions of such an instrument. Nothing can be more fallacious and more likely to lead to a wrong result, in a case where the rights of the parties are governed by extraordinary stipulations, and the nature of the property itself which is the subject of both securities stands in a peculiar position, than to argue the case as if it were the ordinary sale of an estate by a mortgagee having a power of sale. If the matter had rested simply on the transaction of 1818, it would have been free from doubt. But it is said, that, by the subsequent Act, the legislature gave extraordinary powers to the Exchequer Loan Commissioners; and it was contended by some of the defendants, that, upon high public grounds, the legislature had thought fit to vest a power in the Commissioners absolutely, to extinguish and destroy the rights of any prior mortgagees. That would indeed be an extraordinary power to confer; and I am glad to find no trace of any such intention shewn by the legislature. If that argument were allowed to prevail, it would make the

construction of the memorandum of 1818 totally unimportant; because, if such high and paramount power to extinguish the prior rights had been given and exercised, all question would cease. I think the construction of the Act 5 & 6 Vict. (sess. 2), c. 9, on which the rights of the Commissioners has been maintained before me, is reasonably plain. It refers to a sale by the Commissioners, and gives them a power to sell property vested in them by way of security. That very Act, so far from setting at nought or treating as of no effect the rights of the holders of prior securities, very expressly recognises them; and in the 20th section itself, which gives the power of sale, there are words which plainly shew that it was in the contemplation of Parliament that the Loan Commissioners, exercising that power, might have to exercise it in a case in which the extent to which they could exercise it must be limited—that is, that they should not exercise it so as to defeat the right of any holder of a prior estate. And how could it? If an estate were conveyed under the first security, and actually vested in a first mortgagee, there must be plain words in the Act to authorise a second mortgagee to convey any of the estate which is not vested in him, but vested in another person.

The Act of Parliament only enabled the Exchequer Loan Commissioners to do that which might be done consistently with justice and common sense—that is, to foreclose the subsequent mortgagees, who could have no right in the estate till the demands of the Commissioners were satisfied. It gave the Commissioners a power of conveying an absolute estate against them, as completely as if they were foreclosed.

But it is said, that the use of the expression "foreclosure" authorised them to convey the estate of the prior mortgagees. The language shews it was intended to authorise them to convey nothing of the kind. The subsequent words, which direct that mortgagees, who are thus to be

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foreclosed, should not be deprived of any claim to the surplus of the property, shew that the foreclosure was plainly only of the subsequent mortgagees, because that direction is consistent with right and justice too; for the subsequent mortgagees taking subject to the prior mortgage, and only taking what might remain after the prior mortgage was fully satisfied, of course, their right would be to the surplus. If the Act were dealing with the right of prior mortgagees, it would have enacted, that, out of the money to be produced by the sale, the prior incumbrancers should be first paid. Instead of that, the language is plainly language applicable only to the case of subsequent mortgagees—that is, to the case of such mortgagees as could be foreclosed, and not to the case of prior mortgagees, as to whom the expression "foreclosure" is wholly inapplicable; for they are persons not to be foreclosed, but persons to be redeemed. Therefore, it seems to me, upon the construction of the Act of Parliament and upon the construction of the memorandum, plain, that the Exchequer Loan Commissioners had no right to sell any thing that was vested in the prior mortgagees, except so far as a priority had been given under the memorandum of the 15th of April, 1818.

But it is said, that the effect of the memorandum of 1818, by which a qualified priority was given, has been such as to bring the case within the operation of the 20th section of the Act of the present reign, and that the priority was lost by contract. One thing is plain on that memorandum, as I have already stated, namely, that it only refers to the rates and dues, and does not refer to the harbour and buildings; therefore, they at least must be considered as out of the question on the construction of this memorandum. The memorandum itself provides, first of all, for the interest; it provides for the interest of both parties first, and then for the payment of the principal That the present defendants who purchased from the Loan

Commissioners had full notice of this memorandum, cannot be denied; for it is recited in the instruments under which they claim, and it is admitted at the bar. Then, the priority given is a priority which only relates to part of the property sold, and relates first of all to the interest. I think I am bound to put a reasonable construction upon this memorandum as an abandonment of priority, and not to give it any larger scope and operation than the language of it naturally bears; and I cannot find that the postponement of the interest of the first mortgagee to the payment of the interest of the second out of the accruing rates and dues, in any way justifies the application of that which should represent the whole corpus of the property, so as to bring it within the operation of the 20th section.

The principal doubt that I have had throughout the argument of this case has been, how far I could deal with the rights of the plaintiff, as modified by this memorandum, in the absence of the Exchequer Loan Commissioners; but, I think, the case is relieved from that difficulty by the terms of the contract between the parties. It is plain that the Exchequer Loan Commissioners only conveyed to and vested in the present defendants, to whom they sold the whole of the right, and whom they put exactly in their position, that which they were entitled to under their security upon the construction of the Acts of Parliament, and upon the effect of this memorandum; and in that view of the case I cannot treat this railway company (who, in the year 1843, by virtue of the powers of an Act of Parliament, purchased from the Exchequer Loan Commissioners,) as having, by means of that purchase, acquired any better right against the plaintiff than the Exchequer Loan Commissioners. In fact, by purchasing, they put themselves in the place of the Loan Commissioners with reference to this property. Having notice of this memorandum, they must be taken as standing exactly in the same position with the Exchequer Loan Commissioners,

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who, if they were present as parties to this suit, would be absolved from all liability to the account of the subsequent rates and dues sought by the plaintiff. It was said, indeed, on behalf of the defendants, that they carefully distinguished between the rights of the plaintiff as against themselves, and their rights as against the Exchequer Loan Commissioners. Now their rights as against the Exchequer Loan Commissioners were simply the rights of a first mortgagee, as qualified by a particular agreement, for the application of the rents and profits; and if I find that the second mortgagee acquired priority as to the application of the rents to his interest before the interests of the first mortgagee, and to his own principal before the principal of the first mortgagee, and if I find a sale and assignment under such circumstances, I must treat it exactly in a way the very reverse of that which is contended for here. I must hold that the Exchequer Loan Commissioners had the power to put the present defendants in their own stead as to their liability, and that the right under the security, which these plaintiffs held, is to be established now against the holder of the harbour and buildings, and the receiver of the rents and dues included in the plaintiff's security, which would have been directed against the Loan Commissioners if they had continued in their original position.

Therefore, I must declare that the plaintiff, by virtue of her security, and subject to the terms of the memorandum of the 15th of April, 1818, is entitled to a right against the defendants for an account of the harbour dues, and, as an incumbrancer upon the harbour and buildings, is entitled to a priority over the defendants. I asked, in the course of the argument, whether the amount received since the year 1843, when the defendants became the purchasers and had the property assigned, was as much as would cover the claim of the plaintiff upon the footing of the decree that I propose to make; and it seems the amount received is nearly sufficient.

It appears in the course of this cause that the defendants are not merely the purchasers from the Loan Commissioners, but that, besides their conveyance as purchasers, they took an assignment of the security; and, therefore, as assignees of that security, they stand exactly in what I consider their proper situation with reference to the rights of the plaintiff, and the decree against them must be on that footing. If the amount of the harbour dues received by the defendants is more than enough to pay all that is due for interest in respect of the 10,000*l.*, which I understand it is, next comes the payment of what is due for the arrears of interest to the plaintiff, and after that the payment of the principal of the 10,000*l.*, and after that the payment of the 1600*l.*, which is the principal money of the plaintiff's security. That would relieve the case from any remedy against the harbour and buildings.

As to the claim of the defendants to be allowed all the monies they have laid out on the property for constructing a railway and other works on it, there is no case for sustaining such a claim. When I look at the way in which the property has been dealt with; and when I find that the harbour and buildings, as to which, in my opinion, the plaintiff has a clear priority, have been conveyed by the second incumbrancers to purchasers who have wholly altered and converted the nature of the property; and when I find that the defendants claim interest on all their outlay for that purpose, and claim to be allowed in respect of that outlay everything that is due to them in respect of it before anything is paid to the plaintiff, I cannot recognise a claim on that footing at all. It is not within the principle of the cases cited at the bar, in which it has been held, according to the ordinary course of the Court, that a mortgagee in possession laying out money for the improvement of the property should be allowed for that outlay. That principle, according to the authorities, never extends to such an outlay as this, or to anything that relates to the conversion and alteration of the

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property. Therefore, I cannot recognise the right of the defendants in that respect at all.

The principle of the decree which I make I have endeavoured to explain, and it would be a more satisfactory way perhaps in working it out, considering the amount of receipts, that the demand should be satisfied out of the produce of the harbour dues.

With regard to the question on the Statute of Limitations, I do not think it has any application. I have not the least doubt as to this, and therefore I recognise the right to interest on both sides. I give the defendants the same right.

The first declaration will be, that the harbour and buildings were not included in the operation of the memorandum (as to which the plaintiff has never lost her priority), but only the dues. Then declare that the rates, dues, and duties in respect of the harbour, are applicable, first, in payment of the interest due to the defendants, as assignees of the security of the Exchequer Loan Commissioners; that, in the second place, those rates, dues, and duties are to be applied towards payment of the principal money due to the defendants as assignees of the Exchequer Loan Commissioners; and, lastly, in payment of the 1600*l.*, the principal money due to the plaintiff: and with these declarations there will be an account on that footing.

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Bill by one of the next of kin against the executors and one of the legatees in a will fraudulently obtained by them from a person of unsound mind, praying for an account, and for an injunction and receiver pending a suit in the Ecclesiastical Court to recall the probate:—*Held* maintainable in this Court, and demurrer for want of equity overruled.

THIS was a demurrer for want of equity, filed by the defendant Nicholas Samuel Edward Steinberg.

The bill was filed by William Dimes, as the next of kin of Thomas Dimes, deceased, solicitor; and alleged, that the said Thomas Dimes had died possessed of considerable real and personal estate; that the defendant Steinberg was the articled clerk of the said Thomas Dimes, and, at the period of his death, had nearly completed his time; and that, since his death, the said Steinberg had taken to himself the business of the said Thomas Dimes as attorney and solicitor, and the goodwill thereof, and claimed to retain it for his own use and benefit under some agreement, which the plaintiff charged he ought to discover. In November, 1847, the said Thomas Dimes was afflicted with a serious illness, from the effects of which his mind became affected, and his conduct that of a furious maniac, so that it was found necessary to place him under the restraint of two male keepers; but, early in 1848, he was released from their custody and entrusted to the care of a housekeeper. On the 8th of January, 1848, being in a declining and precarious state, he inflicted a wound on his left arm to destroy himself. The said Thomas Dimes made several other attempts to destroy himself, and continued, from that time to the day of his death, a confirmed lunatic, and was under several delusions. On the 4th of February, 1849, the defendant Steinberg and the defendant Henry Dimes (the younger brother of Thomas Dimes) were at the house of the said Thomas Dimes, at Littlehampton; and, on the next day, Thomas Dimes was seen writing by his keeper James Foord, who was told by the defendant Henry Dimes that he might go away for an hour or two, which he did. On his return, the said James Foord was

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asked to accompany the said Thomas and Henry Dimes in a walk, and, accordingly, he accompanied them to the shop of one G. E. Hart, of Littlehampton; and, while in such shop, the said Thomas Dimes produced a paper, and said it was his will; and thereupon the said James Foord and George Edward Hart were asked to witness the said will, which they did, after the said Thomas Dimes had, in a state of much agitation, signed it, the defendant Henry Dimes standing near him in the meanwhile; that, at the time he executed such will, Thomas Dimes was of unsound mind; that the document so signed was a document prepared in draft by the defendant William Dimes, with the aid and assistance of the defendant Steinberg, and was executed between them, purporting to be the last will and testament of the said Thomas Dimes; by which the said Henry Dimes procured himself and the defendants Elizabeth and Susannah Jane Dimes to be named universal devisees and legatees, with inconsiderable exceptions; that, by the said alleged will, the said Thomas Dimes bequeathed to the defendant Steinberg all the furniture in his offices in Bread-street, together with all his law books; that the defendant Henry Dimes procured himself and the defendant Elizabeth Dimes to be named executor and executrix of the said will, and obtained probate thereof and of a codicil thereto within seventeen days after the death of the said Thomas Dimes, without giving to the plaintiff notice of their intention to do so; and that the said Henry Dimes induced the said Thomas Dimes to reside with his keeper, at the house of the said Henry Dimes, from the end of March, 1849, to his decease, except for one period of six weeks, in 1849, when he resided at Barnes, in a lodging taken for him by the defendant Henry Dimes.

Within a fortnight after the said Thomas Dimes was removed to the house of the said Henry Dimes, he was induced by the said Henry Dimes and N. S. E. Steinberg, to execute a paper, purporting to be a codicil, revoking

the legacy of 15*l.* per annum given by the alleged will to his housekeeper, and confirming the said will in other respects. At the time they procured the execution of the said alleged codicil, the defendants H. Dimes and N. S. E. Steinberg well knew that the said Thomas Dimes was a lunatic, and incapable of taking care of himself. The plaintiff was not informed, on the occasion of his making several visits to the said Thomas Dimes, that he had executed any will. The defendant Elizabeth Dimes went to reside with the said Thomas Dimes at the house of the said Henry Dimes, and remained there until a few months after his decease. The plaintiff saw and conversed with the said Elizabeth Dimes on the state of mind of the said Thomas Dimes, at the time of his visits, and on every such occasion it was considered and assumed, as the fact was, that the said Thomas Dimes was of unsound mind, as he had previously been treated and considered at Littlehampton; but the defendant Elizabeth Dimes never informed the plaintiff of the signature of the said papers, though she well knew thereof. On the 5th of August, 1850, the plaintiff received a letter from the said Henry Dimes, informing him of the death of the said Thomas Dimes. The funeral took place on the 11th of August, and the plaintiff attended the same. Between the death and the funeral the said Henry Dimes and Elizabeth Dimes, in answer to inquiries, informed the plaintiff that there was a will made by the said Thomas Dimes a very long time ago, of which they were appointed executor and executrix; and that all the property was left to them, and to the defendant Susannah Jane Dimes; by which representation the plaintiff was made to believe that the said will was made long before the illness of the said Thomas Dimes. The plaintiff, not doubting the said statements, made no further inquiry as to the said alleged will, but has lately discovered he was misled by such statement; and the matters shewing fraud, as the plaintiff avers, on the part of the defendants, Nicho-

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las Samuel Edward Steinberg, Henry Dimes, and Elizabeth Dimes, in procuring the said papers, purporting to be a will and codicil, have become known to the plaintiff only since March, 1853. In February, 1853, in a conversation between the plaintiff and Henry Dimes, the latter appearing to be dissatisfied with the conduct of Steinberg in managing his affairs, the plaintiff advised him to take his affairs out of the hands of Steinberg; when the said Henry Dimes said, he must not make an enemy of him. The plaintiff then asked how he was in his power, to which no reply was given. The plaintiff then asked, by what arrangement Steinberg had succeeded to the deceased's business? when he was told, that it was partly by agreement in his lifetime, partly under his will. The plaintiff then made further inquiry about the will, when the defendant Henry Dimes spoke as follows (the plaintiff having shortly afterwards made a note of the statement): "Knowing there was no will, the day before it was made I went to Littlehampton, determined to have one made: I said, he ought to make a will; he said, he did not know how. On the morning of the date of the will, I said he ought to make it, he took out some paper, wrote out a draft, and then copied and signed it. All done in an hour or two. I got the will from him, and came with it to London, determined he should never have that again. I kept it, though he many times afterwards wanted me to give it up to him." In consequence of this information the plaintiff procured a copy of the will and codicil of the said Thomas Dimes from the Registry Office, when he ascertained for the first time that it was dated four weeks after the commencement of that illness in 1849, when the lunatic made the attempt on his own life, and was under the care of James Foord: and two weeks after, the defendant Elizabeth Dimes agreed with the plaintiff, that it was too late for him to make a will. The plaintiff subsequently obtained knowledge of these facts from Foord, which shew that Thomas Dimes was in-

capable of making a will, and that fraud or deceit was practised by the defendants Steinberg and Henry Dimes, in obtaining Thomas Dimes's signature; and by Henry Dimes and Elizabeth Dimes in secretly and hastily obtaining probate thereof. After the death of the said Thomas Dimes, the alleged executor and executrix took possession of the property, and got in the personal estate; and the defendant Steinberg assumed and took to himself the right to the business of the said Thomas Dimes, and recovered debts and paid them over to the defendants, deducting a portion for himself, but retained the profits of the business to his own use; that the defendant Steinberg gave no consideration to the said Thomas Dimes for the said business, but claimed to be entitled thereto under some agreement made during the lunacy of the said Thomas Dimes; and that such agreement was therefore void in equity; and that the said business was a part of the estate of the said Thomas Dimes, and ought to be realised and accounted for; that the name of the attorney to whom, during the unexpired term of his clerkship, the articles of the said Steinberg were assigned, was for a short time placed on the door of the place of business, but was shortly afterwards removed. From November, 1847, Henry Dimes assumed the control of the funds of the said Thomas Dimes; and though the latter still drew cheques, it was done not of his own free will or discretion, but as the instrument and under the direction of the said Henry Dimes; and that the said N. S. E. Steinberg received various monies in the name of the said Thomas Dimes. The said Steinberg, in all the transactions aforesaid, acted as the confidential adviser, coadjutor, and agent of the said Henry Dimes, and has throughout concerted with him the measures necessary for enabling the defendants Henry Dimes and Susannah Jane Dimes to obtain and possess the property and effects of the said Thomas Dimes, other than his said business, office furniture, and law books, and in particular the measures and proceedings

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which are hereinbefore stated to have been taken and adopted on the part of the respective defendants last named; and that the defendant Steinberg has throughout co-operated with the other defendants in concealing and securing the effect of the fraud practised upon the plaintiff as hereinbefore averred in respect to the said will and codicil.

The defendants Henry and Elizabeth Dimes, abetted by the defendant Steinberg, fraudulently affected to make a title to a house, which they sold to the Corporation of London, as devisees under the alleged will, and fraudulently concealed that it was invalid in law, and required 2000*l.* to be paid from the purchasers of the property affected to be sold by them, and which was subsequently pulled down by the Corporation in improving the city.

Divers mortgage and other debts are due to the estate of the said Thomas Dimes and ought to be got in.

The plaintiff, as one of the next of kin of Thomas Dimes, has instituted proceedings in the Prerogative Court to obtain a revocation of the probate granted to the defendants Henry and Elizabeth Dimes, and is now prosecuting the same.

The defendants are now spending, and have spent, a large portion of the funds come into their hands in respect of the estate of the said Thomas Dimes; and there is good reason to believe that enough will yet remain to make up what the plaintiff is entitled to as next of kin; and that a receiver ought to be appointed.

The Corporation of London, as purchasers from the said defendants as devisees under the said alleged will, claim to be entitled to the said house; and if their title is valid, which, however, the plaintiff does not admit, the remedy of the plaintiff is in this Court, and not in a Court of law.

The plaintiff, as heir-at-law, has commenced an action in ejectment against the defendants (other than Steinberg) to try the validity of the said will.

The said Thomas Dimes was seised of other freehold lands, which the plaintiff alleges the defendant ought to discover, and the value thereof.

The right of the plaintiff to all the freehold property will be tried in the action of ejectment.

The defendants threaten to get in the personal estate, and to sell the real estate, and refuse to dispose of the same and the proceeds thereof so as to abide the result of the proceedings instituted to determine the validity of the said will.

The defendants have released, and are now in course of releasing, various debts due to the estate of the said Thomas Dimes.

The defendant Steinberg is compassing and confederating with the other defendants to defeat the just rights of the plaintiff, by representing to various persons that the said alleged will and codicil are valid, though he is well aware of the contrary thereof; and is acting for the defendants in obtaining possession of the personal estate of the said Thomas Dimes, though he knows the next of kin are entitled, and that the plaintiff is one of such next of kin. And, as a consideration for such assistance, he is allowed to remain unmolested in the enjoyment of the business and the goodwill thereof, and the gains and profits thereof.

The defendant Steinberg has received various sums in behalf of the other defendants and in their names, but has not paid them over or accounted for the same to the said defendants.

Under these circumstances the plaintiff avers, that the said will and codicil were proved to be made by the fraud of the defendants Steinberg and Henry Dimes, and are wholly void and of no effect; and that the defendants Elizabeth and S. J. Dimes have been privy to such fraud; and the plaintiff submits, that, under the circumstances, a receiver ought to be appointed, and an injunction granted,

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and such accounts decreed by this honourable Court as hereinafter prayed.

The drafts of the said alleged will and codicil are in the possession, custody, and power of the defendant Steinberg, or of the defendants Henry or Elizabeth Dimes, or one of them, and ought to be produced for the purpose of this suit and the said proceedings in the Ecclesiastical Court; and are necessary to be produced for the determination of the validity of the said will and codicil.

That the defendant Steinberg has in his custody or power the alleged agreement between him and the said Thomas Dimes, under which he claims to be entitled to the business, and the draft of the agreement, document, or paper from which it was copied, and the day books, account books, or ledger pertaining to the said business, the production of which is material to shew that the defendant Steinberg is not entitled in equity to the said business, and also to shew the state of the codicil hereinafter prayed; but the said defendant refuses to produce the same.

Then followed the usual charge as to documents.

The plaintiff therefore prays—1. That each of the defendants, Steinberg, H. Dimes, and Elizabeth Dimes, may be charged in account as an executor de son tort with all the monies come to their hands since November, 1847, or in any way arisen from the estate of the said Thomas Dimes, and that an account may be decreed accordingly; and that what shall be found due on such account may be paid into Court or to a receiver to be appointed, or otherwise secured.

2. That in the account to be so taken and charged against the defendant Steinberg may be included all monies come to his hand in respect of the business of an attorney formerly carried on by the said Thomas Dimes, and the profits thereof, as well since as before the decease of the said Thomas Dimes, subject to a proper allowance for the services of the said defendant.

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3. That the defendant Steinberg may be declared not entitled to the goodwill of the said business; and that the said agreement may be declared void and be delivered up to be cancelled.

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4. That the plaintiff may be let into possession of the property sold, and be compensated for the pulling down of the said house.

5. That a receiver may be appointed to get in and receive the personal estate and effects, debts, &c., due to the estate of the said Thomas Dimes, including the gains and profits of the said business of an attorney, and the debts due on account thereof.

6. That the defendants Henry and Elizabeth Dimes may be restrained from getting in any outstanding parts of the personal estate, and from receiving the rents and profits of the real and leasehold estate, or of the estates in mortgage, and from selling or parting with any of the personal estate now in their hands, otherwise than to such receiver; and that the defendant Steinberg may be restrained in like manner in all respects.

7. That the defendants Steinberg, Henry and Elizabeth Dimes, may be ordered to deliver up the personal estate of the said Thomas Dimes now in their hands, including the 2000*l.* received from the said Corporation, to the said receiver.

8. That one-fourth of the personal estate may be paid to the plaintiff as next of kin.

9. That the plaintiff may have such further relief, &c.

*Argument.*

Mr. *Wilcock* and Mr. *F. T. White* for the demurrer.—The real object of this suit is to impeach the will, as invalid on the ground of the lunacy; but this Court has no power to determine any such question. The plaintiff's remedy, if any, is in the Ecclesiastical Court, where a suit for this purpose is now pending in respect of the personal estate. With regard to the real estate, his remedy is at law, and

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he has already commenced an action in ejectment: *Jones* v. *Jones* (*a*), *Jane* v. *Frost* (*b*), *Gingell* v. *Horne* (*c*), *Allen* v. *Macpherson* (*d*). In order to avoid the difficulty, the bill asks that the defendants may be treated as executors de son tort; but the only things alleged in the bill to have come to the hands of the demurring defendant are the business premises, furniture, and books; these, on the allegations of the bill, passed to the defendant Steinberg, under an agreement made in his lifetime; and the possession of them, therefore, will not make him an executor de son tort (*e*).

The bill alleges that the property is in danger, and asks for the appointment of a receiver, and an injunction pending the determination of the question between the parties; but the bill expressly states, that the monies received by the demurring defendant have been paid over to the executors, except the profits of the business of an attorney, which, it is submitted, are not assets (*f*). In this case, according to the allegation in the bill, the testator was a lunatic three years before his death.

That the defendant Steinberg is not an executor de son tort as to that part of the property which came to his hands for the other defendants, is clear on the authorities: *Hall* v. *Elliott* (*g*); but, were it otherwise, there can be no executor de son tort while there is an executor properly appointed: *Tomlin* v. *Beck* (*h*).

If, then, the relief mainly sought by the bill fails, the incidental relief, viz. the appointment of a receiver, must fail also. In order to support such a suit as this, it must be shewn that a receiver is necessary; it is not enough to make out a case for recalling probate: *Newton* v. *Ricketts* (*i*).

Lastly, the defendant is represented as a mere agent of

(*a*) 3 Mer. 161.
(*b*) 3 Madd. 1; 1 Jac. 466.
(*c*) 9 Sim. 539—548.
(*d*) 1 H. L. Cas. 191.
(*e*) God. pt. 2, c. 8, s. 3.
(*f*) Collier on Partnership.
(*g*) Peake N. P. C. 119.
(*h*) T. & R. 438-9 (judgment).
(*i*) 10 Beav. 525.

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those who committed the alleged fraud; therefore, he is not a necessary party to the suit.—The case of *Watkins* v. *Brent* (*a*) was also cited.

*Argument.*

Mr. *W. M James* and Mr. *W. D. Lewis*, for the plaintiff, were not called on.

The VICE-CHANCELLOR:—

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The allegations in this bill have not so much precision or conciseness as could be desired, but there is quite enough stated to make it impossible for me to allow this demurrer. The bill is to be sustained on the well-understood principle of the interposition of this Court pending proceedings in the Ecclesiastical Court, where the circumstances of the case are such as to render it improper that those whose conduct is impeached should have the control over the property in contest. The executors have not demurred, but the demurring defendant is a person, who, it is argued at the bar, was a mere agent. If the bill represented him as a mere agent, I should be bound to allow the demurrer; but the bill alleges a great deal more than mere agency. It alleges, and, for the purpose of this demurrer, must be taken as alleging truly, that a will was fraudulently obtained from a lunatic, which was attested by his keeper; and that the defendant who has demurred took active steps in procuring the execution by the lunatic of the will, and is himself a legatee named in it. It is clear, therefore, that, to the fact of agency, the bill adds, that he associated himself with other persons in doing what was highly improper and fraudulent. It was contended, that, this bill seeking to impeach the whole will, the plaintiff's remedy is in the Ecclesiastical Court, and that this Court has no jurisdiction to retain such a bill; and the case of *Watkins* v. *Brent* (*a*) is cited, in which Lord *Cottenham* held, that the institution of a suit in the

(*a*) 1 My. & Cr. 97.

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*Judgment.*

Ecclesiastical Court is not alone sufficient to induce this Court to restrain the executor from receiving assets. But, it is to be observed, that, in that case, Lord *Cottenham* expressly says, it would be different if there were fraud, and if there was a strong presumption against the will (*a*). As, on the argument of a demurrer, the facts must be assumed to be true, they raise, in this case, a violent presumption against the will, and against the conduct of those who obtained such a will; of whom one has demurred, who is himself a legatee under the instrument so obtained,—a presumption so violent as to entitle the plaintiff to the assistance of this Court in protecting the property. It is contended, that, as the bill asks that the defendants may be treated as executors de son tort, and for an account on that footing, unless that case be maintained I must allow the demurrer; but the bill asks for a receiver, and I cannot allow the demurrer. The facts in the bill shew, that the Ecclesiastical Court will reduce the defendants to the character of wrong doers. Upon the ground that the bill alleges fraud, and that the demurring defendant is a legatee under the will which is impeached, I am of opinion that the demurrer must be overruled.

(*a*) 1 My. & Cr. 102.

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*Jan.* 19*th.*

IN THE MATTER OF THE NORTHERN AND SOUTHERN CONNECTING RAILWAY COMPANY, AND OF THE WINDING-UP ACTS.

MERCER'S CASE.

A person summoned, under the 63rd sect. (*a*) of the 11 & 12 Vict. c. 45, as a contributory, to attend before the Master, is entitled to have his travelling expenses tendered to him.

THIS was a motion, on the part of the official manager, that Mr. Fletcher Mercer, of Gainsborough, be committed to the Queen's prison for contempt in not appearing before Master *Humphrey*, pursuant to a summons served upon him for that purpose. It appeared from the affidavit, that, in order to save expense, the shareholders in this company were applied to to admit their execution of the company's deed, with an intimation, that, if they refused, the costs of proving the execution must be defrayed out of the assets. Mr. Mercer, on being applied to, refused to admit his execution of the deed, and, therefore, he was personally served with a summons to appear and be examined before Master *Humphrey* on the 10th of May, 1853. But, on the occasion of such service, no money was tendered to him for his travelling expenses from Gainsborough to London. He did not attend or assign any reason for not doing so.

The Master's certificate of Mr. Mercer's default was produced to the Court, with an affidavit of the personal service of the summons and notice of this application.

(*a*) The 63rd section enacts: "That it shall be lawful for the Master, as well before as after the order absolute, to summon before him any person, whether a contributory of such company or not, who shall be, or shall be deemed to be, capable of giving information concerning such company, or the estate, dealings, or affairs thereof, and also to require such person so summoned to produce, and if a contributory to leave with the Master or the official manager, any books, papers, deeds, writings, or other documents, in the custody, possession, or power of such person, which may appear to the Master to be necessary or expedient to be produced or left as aforesaid; and it shall be lawful for the Master to examine any such person upon oath, by word of mouth,

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*Argument.*

Mr. *Roxburgh* for the motion.—The 64th section (*a*) contemplates two distinct classes of persons, viz. witnesses and contributories, or what, by the Amendment Act, sect. 9 (*b*), was the same thing, alleged contributories. By the first branch of the section, which relates to witnesses, it is provided, that they shall have the costs and charges usually allowed by law to witnesses. Then the second part of the section, referring to contributories, provide that they shall have only such costs and charges as the Master may think fit to allow. The Master may also suspend the allowance until such time as he may think ex-

or upon interrogatories in writing, concerning such company, or the estate, dealings, or affairs thereof; and every person so summoned, who shall not come before the Master, or shall refuse to be sworn and examined, or shall not fully answer to the satisfaction of the Master, or shall refuse to sign or subscribe his examination, or shall refuse to produce or shall not produce any such book, paper, deed, writing, or document, shall be liable to be committed to the Queen's prison: Provided always, that every such default or refusal shall be certified by the Master, and thereupon such order shall be made by the Court, upon motion for that purpose, of which notice shall be given to the person sought to be affected, as the Court shall see fit."

(*a*) Sect. 64. "That every person summoned before the Master as a witness shall be entitled to such costs and charges as are by law allowed to witnesses; but that where any person, who, at the time of the order absolute, was a contributory of such company, shall be summoned as aforesaid, every such person shall have such costs and charges only, if any, as the Master, in his discretion, shall think fit; but in all such cases the Master may suspend the payment of such costs until such time as he shall think reasonable."

(*b*) By the 12 & 13 Vict. c. 108, (1849), s. 9, it is enacted: "That the word 'contributory,' as used in the said Act (11 & 12 Vict. c. 45) or in this Act, with respect to the persons* who are to attend the proceedings before the Master, and to the representation of classes of contributories, and to the representation of contributories being minors or lunatics, and to the appointment by the Master of next friends, guardians, or representatives, and with respect to determining and resolving questions of law or of fact, or matters in contest arising in or about the winding-up of the affairs of any company, shall be taken to include alleged contributories."

* Ss. 37, 38.

pedient. Any other construction of the Act would lead to enormously increased expenses in winding-up.

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Mr. *Daniel* and Mr. *Hetherington* appeared for Mr. Mercer, but were not called on.

The VICE-CHANCELLOR:—

*Judgment.*

I feel the importance of the question involved in this case, because, on one construction of the statute, the official manager would be bound to tender to every contributory who repudiated that character, the expenses of his journey to attend and be examined at the office; but, notwithstanding this inconvenience, I cannot construe the Act in a way to justify me in treating this person as guilty of a contempt of the Court. The 64th section relates—first, to witnesses; and, secondly, to contributories. According to the construction pressed on the Court by the counsel for the official manager, every alleged contributory is within the second branch of the statute. In one sense this is correct, but not absolutely so; because, if an alleged contributory is proved not to be a contributory, he becomes a mere witness, and is remitted to the operation of the first branch of the section. But a contributory who denies that he is so, must, in my opinion, so far as his right to have tendered to him his travelling expenses is concerned, be held entitled to the more favourable consideration conceded by law to a witness. At law, a witness is entitled as of right to his reasonable costs and charges, though he cannot obtain them beforehand, for the simple reason, that they cannot beforehand be ascertained. But, though unable to get his costs and charges in the first instance, a witness, living at a distance, is always entitled to have his travelling expenses tendered to him with the subpœna, or he is under no obligation to attend. His costs and charges are provided for afterwards. I think I am bound to treat the words "costs and charges," in the latter part of the section, as meaning the costs and charges to which a witness would

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*Judgment.*

be entitled after attending in that character. I have not now to determine what costs and expenses a person attending before the Master would be entitled to, but merely whether, by analogy to the rule of law, a person summoned to give evidence, who contended that he is a mere witness, is or is not entitled to have tendered to him a sum for travelling expenses sufficient to enable him to obey the order. I think he is; and I shall therefore refuse the motion, with costs to be paid out of the estate.

*Jan.* 30*th.*

## THORP *v.* OWEN.

A testator seised of lands in common socage, and of other lands in gavelkind, desired everything to remain in its then present position during his wife's life, for her use, and, after her decease, devised his real estate to his then male heir and his heirs, in strict tail male: —*Held*, that the lands in gavelkind, as well as those in common socage, passed to the testator's heir at common law.

THE suit was instituted, among other objects, to obtain the determination, by the Court, of the construction of a will, which was in the following words: "This is the last will and testament of me, Henry Owen, of &c. I desire everything to remain in its present position during the lifetime of my wife, for her use and benefit; and, after her decease, I devise my real estate to my then male heir and his heirs, in strict tail male; and I wish my personal estate to be then equally divided among all my children; and I appoint my friends, James Bridger, and his brother George Bridger, both of &c., my executors, hereby revoking all former and other wills, and declaring this only to be my last will and testament, dated the 26th day of June, 1841. I give the above devise to my wife, that she may support herself and her children according to her discretion, and for that purpose."

The testator died on the day of the execution of the will, leaving his widow and eleven children—five sons and six daughters—surviving. The eldest son was at that time upwards of thirty, and the youngest child about ten years of age; several of the children were married in the lifetime of the testator.

The executors named in the will renounced probate;

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and letters of administration with the will annexed were granted to the widow.

*Statement.*

The bill was filed by the younger sons, and some of the daughters, and the husbands of the married daughters, against the widow, the heir-at-law, and the other children of the testator; and prayed the execution of the trusts of the will, and a declaration of the rights of the parties.

At the hearing of the cause, the common inquiries with respect to the family and the accounts of the estate were directed.

The cause came on for further directions in 1843, and was twice argued before Sir *James Wigram*. The argument occupied five days. That learned Judge delivered an elaborate judgment on the principal point then raised, and held, that the widow took an absolute interest for her life in the real and personal estate of the testator (*a*).

The cause was referred back to the Master, and afterwards became attached to this branch of the Court.

Mrs. Owen the widow died on the 14th of December, 1853.

A petition was presented, shortly after the widow's death, by the plaintiffs, stating the will, and the various proceedings in the cause, and asking for an order disposing of all the interests of the parties in the cause.

It appeared from the Master's report made in the cause, that the testator was, at the time of his decease, seised of certain freehold lands in Essex, held in free or common socage tenure, and that he was also seised of certain other freehold lands in Kent, held in gavelkind.

The petition asked, among other points, for a declaration of the rights of the sons of the testator in the real estate of which he was seised at the time of his death, both as to such part thereof as was of free or common socage tenure, and as to such part thereof as was of gavelkind tenure.

*Argument.*

Mr. *Bacon* and Mr. *Josiah W. Smith*, for the petitioners.

(*a*) See the case reported fully, 2 Hare, 607.

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—The construction for which the petitioners contend is the strictly literal and technical construction. According to that construction, the devise is to the person or persons who, at the death of the tenant for life, shall answer the description of male heir, according to the respective tenures of the hereditaments, that is, to the male heir at common law in respect of hereditaments of socage tenure, and to the male heir in gavelkind in respect of hereditaments of gavelkind tenure. The will was made on the day of the testator's death, and was made in fact in extremis; and this accounts for its brevity, and for the testator not making two distinct devises of the lands held by distinct tenures. As to the supposition that the testator must have intended only one person to take under the designation of his heir male, that is mere conjecture, which must be laid aside, since it is the duty of the Court to construe technical words according to their strict technical meaning. No objection to this construction arises from the use of the word heir in the singular number. It is laid down by Lord Coke (*a*), and by Blackstone (*b*), that, in coparcenary, whether by the common law or by custom, all the parceners make but one heir. And, accordingly, in *Chambers* v. *Taylor* (*c*), the daughters were held entitled to take under the designation of heirs female. There is indeed an authority, which might seem at first sight to favour the heir at common law, namely, Co. Litt. 10. a. (*d*).

(*a*) Co. Litt. 163. b.

(*b*) 2 Com. 187.

(*c*) 2 My. & Cr. 376.

(*d*) The passage from Lord Coke here referred to, is as follows:—"And here our author is to be understood to speak of heirs when they are inheritable by descent, for they are capable of land also by purchase, and then the course of descent is sometimes altered. As if lands of the nature of gavelkind be given to B. and his heirs, having issue divers sons, all his sons after his decease shall inherit; but if a lease for life be made, the remainder to the right heirs of B. and B. dieth, his eldest son only shall inherit, for he only to take by purchase is right heir by the common law. So note a diversity between a purchase and a descent."

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*Argument.*

And Mr. Hargrave appears to have assented to and illustrated the authority of the text in his note on the passage (*a*).

The dictum of Lord Coke, and the illustration of it by Mr. Hargrave, are opposed to the language of Lord *Hardwicke* in *Roberts* v. *Dixwell* (*b*), who decided in favour of the heir at common law, expressly on the ground that it was an executory trust in which the Court is in the habit of construing technical words more liberally than in the case of trusts executed, or direct devises of legal estates. And the passage in Co. Litt. may be as little law at the present day as is the passage in the same work, which asserts the necessity of an heir female being heir general as well as female, which has since been certainly overruled (*c*). But, admitting what Lord Coke says to be law, there is a substantial distinction between the case there put and the present. There the limitation is to the heir of a stranger, here it is to the testator's own heir. The testator knows of what his property, which is to be inherited, consists, and he must be taken to know the law of inheritance; and if he devises to his heir, that devise must be construed according to its strict technical import.

(*a*) Mr. Hargrave's note 53 to Co. Litt. 10. a., is as follows—"Acc. Rob. Gavelk. pp. 117, 118, of the 1st and 2nd editions, but pp. 156 and 157 of the 3rd edition, and the authorities there cited. The reason seems to be, that, though the *subject* of the gift is *customary* land, the heir at *common law* is presumed to be meant, unless words are added to describe the *customary* heir. But if *such special* words are used the presumption fails, and then it is said, that, though the *subject* of the gift is *common-law land*, yet the *customary heir* shall be preferred. On this principle Lord Chancellor *Cowper*, in a case before him, declared, that if one, having *borough English* land and also lands at *common law*, devises the latter to his heir by the custom of *borough English*, this will be a sufficient description of the youngest son, though not heir at common law, and though the devise is not of the *customary* but of the *common-law* land; and that a like devise to gavelkind heirs would entitle all the sons: (2 Vern. 732; and Prec. in Chan. 464).

(*b*) 1 Atk. 610.

(*c*) See Robinson on Gavelkind, 3rd edit., p. 157, n. (*f*).

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*Argument.*

To construe a devise of gavelkind land to testator's heir as a devise to his heir at common law, is to translate a technical word into words of a totally different import; it is to translate the word heir into the person who *would have* been heir if the land devised had been of socage instead of gavelkind tenure.

Mr. *Malins* and Mr. *Southgate* for John Frederick Owen, the heir-at-law at common law, said, they relied on Co. Litt. 10. a., and Mr. Hargrave's note thereto, and on the passage in Robinson on Gavelkind, p. 118, and were proceeding to argue the case on behalf of Mr. J. F. Owen, the heir at common law, but were stopped by the Court.

Mr. *Osborne*, Mr. *Toller*, Mr. *Nicholls*, and Mr. *Smale*, were for other parties to the cause.

*Judgment.*

The VICE-CHANCELLOR said:—

It has been long settled, that where a testator devises lands to his heir male, he must be held to mean his heir male at common law. The point is concluded by authority. Lord Coke, in the passage which has been referred to, has said it, and Mr. Hargrave assents to the proposition. Robinson, in his work on Gavelkind (*a*), says, that even where there is a devise of gavelkind lands to the heirs or right heirs of J. S., who has issue four sons, and dies, the eldest son of J. S., who is the heir according to the common law, shall take; and he notices that this principle applies to lands held in borough English.

The principle is carried further, for, in *Wright* v. *Atkyns* (*b*) there was a devise and bequest of freehold and leasehold estates together, in favour of the devisor's heir; and Lord *Eldon* held, that the leasehold as well as the freehold vested in the heir as *persona designata*. The same principle was acted on by Lord *Alvanley*, in *Gwynne* v. *Muddock* (*c*).

(*a*) Page 118; p. 156 of 3rd edit.
(*b*) 19 Ves. 299.
(*c*) 14 Ves. 489.

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*Judgment.*

As to the argument founded on the modern decisions having overruled the opinion of Lord Coke, that the person to take under a gift to heirs female must be heir general as well as heir female, no doubt it has been held, ever since the case of *Wills* v. *Salmon* (*c*), that the opinions of Lord Coke and Mr. Hargrave on that point are no longer the law. But it seems a whimsical thing to say, that the opinion of Lord Coke and Mr. Hargrave, applicable to the present case, is to be discredited and overruled, because their opinion on another point, entirely different and inapplicable to this case, had not been followed in modern times.

Declare that John Frederick Owen, the eldest son and heir male according to the common law, is entitled to the real estate, as well that which was of free or common socage tenure as that which was of gavelkind.

(*a*) 2 Bla. 87.

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## IN THE MATTER OF THE SEA, FIRE, AND LIFE ASSURANCE COMPANY AND THE WINDING-UP ACTS.

## EX PARTE GREENWOOD.

*Jan. 25th.*

Where, in a completely registered company, many of the contributories had not paid the amount due on their shares, and the Master had made a call on all the contributories without distinction—the Court discharged the order for a call, and directed the official manager to repay to those contributories who had paid the full amount of their shares all sums received from them under the order.

The official manager is entitled to the most favourable consideration of the Court, where it can be afforded without injustice to other parties.

It is the duty of the official manager to classify the contributories, distinguishing between those who have and those who have not contributed their proportion to the capital of the company.

*Semble*, that, in a company completely registered under the 7 & 8 Vict. c. 110, the deed of settlement limiting the shareholders' liability to the amount of their shares, shareholders who have paid in full are not liable for a call for costs under the Winding-up Act.

Whether, in the same case, shareholders who have paid in full are personally liable for the debts of the company, except under the 66th, 67th, and 68th sections of the statute—*Quære.*

Whether shareholders, who have paid in full for their shares, and have made further payments under an order for a call, are not entitled to recover such excess from those who have not paid for their shares—*Quære.*

ON the 22nd of July, 1853, William Greenwood served a notice of motion upon the official manager of this company for leave to appeal against the order for a call which had been made against him. When the motion came on to be heard, the Vice-Chancellor, following the usual course, di-

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*Statement.*

rected that the appellant should pay the amount of the call and give security for the costs, and on these terms should be at liberty to renew the motion in Michaelmas Term next ensuing. The motion was consequently renewed on the 2nd of November, when his Honour gave the leave required to serve notice of motion to discharge the order, upon payment by the appellant of the costs of the official manager.

On the 10th of November the motion was made. At the conclusion of the arguments his Honour intimated his desire to have the matter re-argued, upon the broad ground of the liability of the contributories generally. The motion was re-argued on the 19th, 21st, and 22nd of November, 1853. The notice of motion asked, that the order of the Master, bearing date the 20th of June, 1853, whereby he peremptorily ordered that a call of 1*l.* per share should be made on the said William Greenwood, as a contributory of the company, might be discharged.

The company was completely registered under the Joint-stock Companies Act, early in October, 1849; and on the 11th of the same month, by a deed reciting that another insurance company, called The Port of London Ship Owners' Loan and Assurance Company, had carried on business for some time past, it was witnessed, that, in consideration of the covenant of the said Sea, Fire, and Life Assurance Company to indemnify the said Port of London Ship Owners' Assurance Society against all demands, and of 10*s.* then paid, the latter did bargain, sell, assign, and relinquish to the said Sea, Fire, and Life Assurance Company all their trade, business, debts, capital, &c., &c. Four directors executed the deed, viz. Mr. Augustus Collinridge, who was the principal promoter of the company and managing director, and Messrs. Davis, Gwynn, and Ogilvie. The capital was stipulated to consist of 100,000*l.*, divided into shares of 1*l.* each, on which the whole amount was required to be paid in the first instance.

Prospectuses were issued, signed by Augustus Collin-

ridge, the managing director, in which "exemption of shareholders from all liability" was stated as one of the distinguishing features of the society. A small pamphlet was at the same time published, containing the scale of premiums &c. on insurance, &c, the names of the directors and officers, the address of the company, &c. This document also contained a statement "that the shareholders would be liable only to the amount of the shares for which they might subscribe; which was, in substance, what was contained in clause 89 of the deed of settlement. The pamphlet also contained the following passage, referring to the case of *Halket* v. *The Traders' Ship Loan and Assurance Association*:—"Final decision by the Court of Queen's Bench, on the 4th of July, 1849, as to the non-liability of shareholders in an incorporated company beyond the amount of their shares."

*Statement.*

The circumstances under which Mr. Greenwood became a shareholder appeared to be as follows:—

On the 6th of November, 1849, a Mr. Church called on Mr. Greenwood as an agent of the company, and requested him to become the agent of the company in Halifax; and having agreed to do so, Mr. Greenwood was informed, that, in order to qualify himself as agent for the company, he must become the holder of twenty-five shares. To this Mr. Greenwood also assented, upon the faith, as he deposed, of the statement in the prospectus that his liability was not to extend beyond 1*l.* per share, which he thereupon paid down, being the amount in full for which he subscribed. He subsequently executed the deed of settlement. The 32nd and 89th clauses of the deed are as follows:—32nd, "That the directors shall have full power and authority from and at any time or times after the complete registration of the company, to contract such loan or loans, and borrow such monies, at such rate or rates of interest, and upon such security, whether of debentures, bonds, or mortgages of the property of the company or otherwise, on be-

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*Statement.*

half of and for furthering the objects and business of the company, as to the said directors shall seem fit, provided that the aggregate amount of such loans do not at any time exceed the sum of one million sterling; and that the directors shall have power to pledge the credit and capital, and mortgage the property and effects, whether real or personal, of the company, for securing the repayment of such loans and interest in such manner as they shall, at their absolute discretion, think most proper and advantageous; and that the monies so borrowed shall be employed, until the repayment thereof, in the manner hereafter provided" (*a*).

(*a*) The following are some of the principal clauses of the deed:

Clause 33. "That the directors shall have full and absolute power, authority, and discretion to conduct and manage, and in and about conducting and managing, the affairs and business of the company; and therein at any time after the complete registration of the company, to prepare and issue, or cause to be prepared and issued, all such policies of assurance on such life or lives, and to grant such endowments, annuities, and loans, and to purchase and sell such reversionary or other contingencies, interests, whether real or personal, and such interests in stock or in mortgage, debts or other personalty, legacies, post obit bonds or annuities, and generally to do or engage in such other acts, transactions, matters, and things, in the line of the company's business, in such cases and on such applications and on such contingencies and risks, at such rates and on such terms and securities, and at such premiums, whether in a gross sum or payable monthly, quarterly, half-yearly, or yearly, or on any half or whole credit system, or on any ascending or descending scale, or otherwise, and generally in such manner and in such form and on such conditions, or in such different forms, as shall to the said directors or to the managing officer duly authorised or empowered in that respect, in their or his absolute discretion, seem expedient: And also to prepare and issue, or cause to be prepared and issued, such policies of assurance against risk of life or damage by fire, as may be usual or necessary for the business of a Fire Assurance Office, on such conditions, and subject to such regulations, as to the said directors in their absolute discretion shall seem expedient: And also to prepare and issue, and cause to be prepared and issued, all such policies of assurance for assuring the fidelity of persons in situations of trust, as may be usual or necessary for a 'Guarantee Asso-

Clause 89 for limiting the liability.—"That, on and after complete registration of the company, there shall be paid by the shareholders, on execution by them of these pre-

ciation,' subject to such regulations as to the said directors in their absolute discretion shall seem expedient: Provided always, that the monies payable in respect of any such life or fire policy of assurance, shall be borne and satisfied as hereinafter provided, only out of the accumulated premiums, contributions, and receipts (howsoever arising), monies, property, and effects, accruing from or belonging to that particular branch of the business in which any such claim or claims may arise, and shall in no case be chargeable or payable out of or borne by such portion or portions of the capital stock and corporate funds of the company as may be accumulated or accrue from payments made in respect of shares subscribed for in the capital of the company, or from the sale of all stock which shall have been purchased by or forfeited to the company, and afterwards sold, or from the produce of premiums, profits, and receipts accruing and to be received in respect of any marine policies of assurance, or of any of the commission or loan branches connected therewith or incidental thereto, or of the guarantee branch of the business of the said company: And provided also, that, in case either one or more of the aftermentioned funds directed to be formed, cannot be made available in time or shall be insuffi-

cient to satisfy its own losses and its share of the expenses of the outfit, establishment, and management, a competent part shall be borrowed from all or any one (as to the directors may seem expedient) of the other funds hereinafter described, and applied to meet such exigency and deficiency; the sum or sums so borrowed to be repaid with interest, at 5*l.* per cent. per annum, out of the fund on account of which such amount shall have been borrowed."

Clause 34. "That there shall be created by the directors, in manner hereinafter mentioned, four separate 'funds,' to be respectively denominated the 'Capital Stock and Corporate Fund,' the 'Fire Assurance Fund,' the 'Life Assurance Fund,' and the 'Guarantee Assurance Fund;' and that separate and distinct accounts of such respective funds shall be kept in the company's books."

The 41st clause provided, "That the monies to be received should be applied in defraying the expenses, and, if necessary, in paying off loans that might have been contracted under the 32nd section."

Clause 42. "That the directors may invest monies not required for such purposes."

Clause 43. "That the directors should have power to transact the business of the company, to obtain a charter or Act of

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*Statement.*

sents, or any deed of accession thereto, or duplicate thereof, in full of all future calls and instalments, the whole of the sum or sums representing the amount of their subscription towards the capital stock of the company, at and after the rate of 20*s.* in the 1*l.* on the declared value of each share; and that, on payment thereof within the time hereinafter limited for the same, no further call shall be made on any shareholder in respect of the share or shares subscribed for or held by him under the provisions of these presents; and that every shareholder shall be entitled to receive from the company interest at and after the rate of 5*l.* per cent. per annum, payable half-yearly, (irrespective of any profits to be declared on the capital of the company in manner hereinbefore directed), in proportion to and pro ratâ for the number and amount of shares in the capital stock subscribed for and actually paid up by him."

The company began to transact business early in October, 1849, and continued till May, 1850.

On the 1st of June, 1850, an order was made by Vice-Chancellor *Knight Bruce*, for dissolving the company and winding-up its affairs, upon the petition of a Mr. Joshua Richardson. On the 27th of June, 1850, an official manager was appointed by the Master, and he shortly afterwards made out a list of the contributories, among whom, on the 4th of July, 1851, the Master settled Mr. Greenwood as a contributory.

In April, 1853, a list of the liabilities of the company

Parliament to increase the powers or limit the liabilities of the shareholders."

Clause 44. "That the directors shall, and they are hereby authorised to make and issue, indorse and accept, in the name of and on account of the company, such bills of exchange and promissory notes as they may think expedient, provided that the total amount of such bills and notes due at any one time shall not exceed the sum of one hundred thousand pounds; and all such bills and notes, and no other, shall be binding on the company and on the shareholders and each of them to the extent of the respective shares held by them in the capital stock of the company, and no further or otherwise."

was made out, by which it appeared that the total amount was the sum of 15,058*l.* 18*s.* 11*d.*

| | £ | *s.* | *d.* | |
|---|---|---|---|---|
| Of that ..... | 2032 | 14 | 11 | was admitted. |
| | 7745 | 9 | 2 | proved or admitted. |
| | 3839 | 5 | 0 | not admitted. |
| | 1858 | 18 | 11 | disputed. |
| Debts of the Port of London ..... | 1615 | 5 | 10 | |

Of this amount the sum of 5508*l.* 6*s.* 5*d.*, was in respect of policies of assurance, leaving a balance of 9550*l.* 12*s.* 6*d.* for the other debts of the company. One of the debts claimed was by Mr. Chapple, a solicitor, who had a judgment against the company for a large amount confessed by Collinridge.

On the 9th of March, 1852, the Master, after some discussion, made a qualified allowance of it, but with leave to bring before him any grounds for impeaching the debt wholly or reducing its amount.

Prior to the 28th of April, 1853, notice was published in the public papers that the Master intended on that day to make a call on all the contributories for 4*l.* per share. As the foundation of the call, the official manager made an affidavit, stating, that, in pursuance of the advertisements, claims had been brought in to the amount of 9445*l.*, of which 4075*l.* 10*s.* 11*d.* had been allowed by the Master, as proved against the estate; that other claims had been brought in, besides 299*l.* 7*s.* 7*d.* appearing in the ledger; that it was besides sought to charge this company with the debts of the Port of London Company; that considerable expenses had been incurred in the proceedings, the costs and charges of the official manager and solicitors being 500*l.*; and that the official manager had only recovered 12*s.* 1*d.*; and that it was necessary to provide funds by a call on the contributories; that the number of shares held by contributories was 30,450; but that, as to 28,946 shares, nothing would be realised in respect thereof; and that a call of 4*l.* per share was necessary.

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*Statement.*

On the 31st of May, 1853, the Master directed the official manager to proceed to get in the amounts due from those shareholders who had not paid up their shares.

On the 23rd of June, 1853, the Master, upon the affidavit of the official manager, made an order for a call.

On this occasion there was put on the file of proceedings a memorandum by the Master in the following terms:—

"Considering that the consideration of the debt of Mr. Chapple was not sufficiently before me to judge whether all the contributories ought to be charged with it rateably, I decline making a call for debts. I order a call of 1*l.* per share for costs, to be payable on the 14th of July, 1853, the official manager to put on the file within a fortnight a statement on oath of the amount likely to be produced by that call; also his solicitor's bill of costs, and a statement on oath of his own expenses and disbursements up to the present time."

The order, as drawn up, was not expressed to be a call for costs.

The official manager accordingly put on the file an affidavit, stating what the probable amount to be produced by the call would be, and also what would be the amount of his own costs.

Mr. Greenwood having failed to pay the call, a balance order was granted against him by the Master in July, 1853.

It appeared from the evidence, that, of four directors who had executed the deed, the managing director Collinridge had gone to Australia, Davis was not in a condition to contribute anything, and Ogilvie was dead. A considerable number of the persons who had executed the deed, and agreed to take shares, had been induced to do so without the means or the intention to pay the amounts due on the shares allotted to them, and, among others, a person named Thomas Towsey, a coal porter, had been induced, as was alleged, for 2*s.* 6*d.*, to subscribe for 20,000 shares.

*Argument.*

Mr. *Lake Russell.*—Upon the authority of *Hunter's*

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*Argument.*

*case* (*a*), it is clear, that the Master, before making a call, was bound to have ascertained the debts, if any, for which Mr. Greenwood was liable; because, until that fact was ascertained, a contributory was liable neither on a call for debts, nor for the costs of winding-up. On these grounds alone, the call was invalid. It is not sufficient that Mr. Greenwood was placed on the list of contributories, he must also be answerable for the debts of the partnership, either at law or in equity, before he can be made subject to a call. It was not the intention of the legislature, under the Winding-up Acts, to create any new liability; and therefore, by the 83rd section of the Act, 1848, which empowers the Master to make calls, the liability of contributories on such calls is expressly limited to the extent "that they are liable at law or in equity." The Master had proceeded on an entirely erroneous principle; he was bound to have ascertained, before making the call, whether Mr. Greenwood was liable, either to the creditors of the company, or for contribution to the partnership; because, if he was liable to neither, it followed, as a matter of course, that he was not liable for the costs.

It was submitted, first, that Mr. Greenwood was not liable to creditors of the company. This was a partnership with a limited liability, and all persons dealing with the managing body must be considered as having acquiesced in the conditions on which the partnership was conducted, provided only they had notice of those conditions. But, under the provisions of the Act, every person having any dealings with the company was at liberty to inspect the deed by which it was constituted, and had power to ascertain what was the security on which he might rely. In the case of *Ridley* v. *The Plymouth Baking Company* (*b*), Mr. Baron *Parke* intimated his opinion, that registration of the deed was notice to a creditor; if so, it was clear that creditors knew that the 89th clause of the deed limited the shareholders' liability to the amount of their subscriptions.

(*a*) 1 Sim., N. S., 435. (*b*) 2 Exch. 711.

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*Argument.*

Then was Mr. Greenwood liable for contributions to the other members of the partnership; to Mr. Chapple, for instance, who, when he sued, had a judgment confessed to him by Mr. Collinridge on behalf of the company? Mr. Chapple had direct notice of the deed, by which the parties' liability, *inter se*, was limited to the amount of the shares for which they had subscribed; and by which it was provided, that any liability beyond that amount would only attach to the partnership property: *Halket* v. *The Merchant Traders' Assurance Association* (*a*). It was not disputed that the shareholders were liable to the full extent of their shares, and it had been so decided in *Lord Talbot's case* (*b*); but that was, in effect, a decision that they were not liable beyond that amount. It might be true that the managing body had incurred expenses for which they were liable; but that circumstance could not extend the liability to those who had become members of the company upon the assurance that they were under no liability beyond the amount of their shares: *Haskew's case* (*c*).

In this case, Mr. Greenwood had been induced to become a member of the company upon the assurance contained in the prospectus copied from the deed, and, as against those persons who were guilty of the misrepresentation, was entitled to the protection of the Court.

But then it would be contended, that, though not liable to creditors, Mr. Greenwood was liable for the costs of winding-up; and *Gay's case* (*d*) would be cited in support of that doctrine; but it was to be observed, that, in that case, the decision in *Hunter's case* was entirely approved of; so that, at all events, the Master was bound to have ascertained that Mr. Greenwood was under some liability before making the call.

It was quite plain, however, by the terms of the 89th section of the deed, that the extent of liability was limited to the sum of 1*l.* per share.

(*a*) 13 Q. B. 960.
(*b*) 5 De G. & S. 386.
(*c*) 17 Jur. 721.
(*d*) 1 De G., Mac., & G. 347.

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*Argument.*

Mr. *Daniel* and Mr. *Roxburgh*.—The argument in this case has proceeded mainly on an erroneous assumption, that the liability of the shareholders in this company is limited to the extent of the price of the shares. The deed, indeed, provided, that no shareholder should be liable beyond 1*l.* per share, i. e. that, having paid that amount, he should be considered as the absolute owner of the shares, without further payment. But it is clear that it was not intended to limit the liability absolutely to that extent; because, by the 32nd clause, the directors had power to borrow a million. Is it pretended, that, if that power had been acted on, the members of the company would not be liable? In fact, it is not within the power of a company to limit their liability to the extent here contended for; but if it were, why resort to an Act of Parliament, as was contemplated here? The capital of the company was one thing, and the credit another; and if the directors had power to pledge the credit of the company, as here, it was clear the partners were liable. In the case of *Ridley* v. *The Plymouth Baking Company* (*a*), the managing body were clearly violating the Act; but in that case there was no decision which touched the question now before the Court, and what had been cited was a mere dictum of Baron *Parke*. This was a partnership; and it would not be disputed, that, before the Registration Act, each partner was liable for the debt of the concern; but, if so, there was nothing in the Act to remove that liability. It was expressly saved by sect. 25 of the Act (7 & 8 Vict. c. 110). But if the contributories were not liable for the debts, they were, at all events, for the costs: *Gay's case* (*b*). *Hallett* v. *Dowdall* (*c*) was also cited.

Mr. *Lake Russell*, in reply.—There was no distinction between capital and credit; the misrepresentation that had been practised was of itself an answer to the claim: *Jarett* v. *Kennedy* (*d*).

(*a*) 2 Exch. 711.
(*b*) 1 De G., Mac., & G. 347.
(*c*) 16 Jur. 462.
(*d*) 6 C. B. 329.

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*Jan. 25th.*

*Judgment.*

The VICE-CHANCELLOR:—

This is an application by Mr. Greenwood, whose name is on the list of contributories, to discharge, as to himself, the order of the Master of the 20th of June, 1853, by which a call of 1*l.* per share was made peremptorily as against all the contributories. It has happened to myself, as to other Judges of the Court, to entertain applications of this kind, which ask the Court to set aside some one single order merely as it affects one individual, who is made a party to the proceedings under the order for winding-up the affairs of a company. My experience has taught me that there is great danger of injustice in making any order on such an application, without a careful examination of the whole proceedings under the order for winding-up, and of the situation and relative rights of the various persons interested in the affairs to be wound up, and of the effect which the order asked will have in advancing the general settlement, which it is the duty of the Court to effect at the least possible delay and expense.

In the present case, the company was completely registered, and a deed of settlement duly executed. The business of the company was carried on in the various departments of insurance, from the 8th of October, 1849, till the month of May, 1850, when, as it would seem, from the misconduct of Collinridge, the managing director, it ceased. He is stated to have absconded on the 8th of April, 1850; but he has re-appeared, and been examined before the Master. The transaction of the company's business was brought to an end in May, 1850; and on the 16th of May, 1850, the petition for dissolving and winding-up its affairs was presented. On the 1st of June, 1850, the Court ordered that the company should be absolutely dissolved from that day, and wound up under the provisions of the Acts of 1848 and 1849.

The question, which was most fully discussed on the motion, was, whether the shareholders, who have fully contributed and paid their share of the capital, accord-

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ing to the constitution of the partnership, are liable to any further payment to the creditors of the company. As this company is within the operation of the statute 7 & 8 Vict. c. 110, which contains express powers as to the means by which the creditors of the company can establish any liability against the shareholders of the company individually beyond the capital and joint effects of the society, the question of liability must be disposed of according to the stipulations in the deed of partnership and the provisions in that statute. On grounds of public expediency, the legislature, by that Act of Parliament, took the first step towards restricting the liability of individual shareholders, and abridging the rights of creditors of companies within the operation of that Act as against individual shareholders.

The publicity which registration gives to the stipulations in the partnership contract of such companies as to the amount of capital and the agreement between the shareholders, was a substitute which the legislature provided for the abridgement of creditors' rights against individual shareholders. Under the 18th section of the Act, every person, on payment of 1*s.*, has a right to inspect the returns, deed, registers, and indexes at the Registry Office. The nature of the business likely to be transacted by those companies made it reasonable to introduce the modification of the rights and remedies which the creditors of ordinary partnerships would have against each separate partner. The principle of that alteration of the law was the registration, which was public notice, and gave to every individual creditor, before he entered into any transaction with the company, the means of knowing the amount of capital of the incorporated body with which he was dealing as the measure of the liability which the shareholders intended to incur, and of the property to which the creditor must look for payment. Beyond that capital, unless upon some special grounds to justify an order for the purpose on application

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to a Judge, these individual shareholders were not to be liable, and could only be made liable under certain conditions prescribed by the Act. The 25th section, which gives to every registered company the privilege of incorporation, says, that it shall not restrict the liability of shareholders under judgments, orders, or decrees, but leaves them liable, not generally, as in an ordinary partnership, but subject to the provisions of the 66th, 67th, and 68th sections.

In the present case, the capital was stated at 100,000*l.* A considerable body of the shareholders paid up their full proportion; but there are shareholders to a large amount who have not yet paid up the full amount due from them according to the deed. It appears, from the proceedings before the Master, that the official manager, whose duty it was to prepare a list of the contributories and of the classes of contributories, has prepared a list, in which they are now all in one general class. It is plain, that those shareholders who have paid everything which, according to the partnership contract, they are bound to pay, and who are, therefore, entitled to say that all further liability as to them had ceased, are in a very different class from those who have not paid and are still indebted in respect of their shares of the capital. What is due from those who have not paid in full, is clearly assets for payment of the creditors of the company, and must have been applied even in the case of a common partnership in exoneration of the liability, which, in such a case, would attach to every partner. As to those who paid in full, of whom Mr. Greenwood, whose motion is before the Court, is one, no further liability could be established, unless according to the provisions of the Act of the 7th and 8th of the present reign, that is, by an order of a Judge, to be made after notice. Among all the creditors of this company who have claimed before the Master, not one has obtained any such order—not one has even applied for such an order.

So far as I can judge from the claims of these creditors, I see nothing that can entitle me to presume, that any ap-

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plication for an order under the 68th section of the Act against Mr. Greenwood, or any other individual shareholder who has paid the full amount due under the registered deed, could have been successful. But I find here a list of contributories, in which, without any classification at all, the shareholders who have paid in full, and those who have paid nothing, are all settled as contributories under one common liability, and are all, without distinction, made liable to the call of 1*l.* per share. The list, indeed, is intitled—"A list of the members and other contributories, distinguishing, as far as practicable, the several classes of contributories, pursuant to the statute, section 76." As originally framed, the list was divided into two classes: the first, described as persons entitled to a share of the assets at the time of presenting the petition; and the second class, described as the executors or administrators of persons liable to contribute to the debts, liabilities, and losses of the company. But the only name put in the second class has been expunged by the Master, and there remains only the one general class. This list, not only makes no distinction between those who have paid in full and those who have paid nothing; but it includes the name of one John Wilson, a member entitled to 2500 shares, in respect of which he never paid one farthing, as a person entitled to a share of the assets of the company.

It seems to have been assumed, during the proceedings of the last three years, that every shareholder in this company, whether he had or had not paid his contribution to the capital, was equally liable to every one of the creditors of the company, and to be visited equally with the costs of this long, expensive, and inconclusive litigation, which is called the winding-up of this company.

At the bar, it was contended, on behalf of the official manager, who supports the order for this call, that, according to the terms of the registered deed of settlement, all the shareholders as individuals, as well as in the *quasi* corporate character which the Act of Parliament has given them,

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are liable for all the debts of the company. The argument in favour of individual liability beyond the amount of subscribed capital was maintained principally on the 32nd, 33rd, and 34th clauses of the deed. It was said, that, under the 32nd clause, the directors had power to borrow money to the extent of one million sterling, for which each individual shareholder was to be liable. The argument was pushed so far by one of the counsel as to assert, that, to the extent of one million, if required for creditors, the Master was justified in making a call on all the contributories. As no money was, in fact, borrowed under that power, it is not easy to understand how the shareholders could be charged for the amount of a sum never borrowed. But the words of the 32nd clause expressly provide, that the loan, if any, should be borrowed, not on the credit of the shareholders individually beyond the amount of the subscribed capital, but expressly only on the credit and capital and property of the company, that is, in their *quasi* corporate character. There is no power whatever to borrow on the individual credit of the shareholders. The argument, therefore, on that clause seems to fail. It seems also to fail on the 33rd clause, which specifies which of the particular funds, (into which the corporate property was to be classified,) the directors, in managing the business, should have the power to make liable according to the different nature of the policies or contracts which might be entered into in the transactions of the company's business. The 44th clause is still more express; for, in giving the directors power to accept bills to the amount of 100,000*l.*, that power is expressly given so as to be binding on the company, "and on the shareholders and each of them, to the extent of the respective shares held by them in the capital stock of the company, and no further or otherwise."

The deed was registered under the Act of Parliament, in order that every person dealing with the company should have the means of becoming acquainted with these and the other stipulations which it contains; and, having the

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means of acquiring the knowledge of such important matters, the law of notice—founded in this respect on a plain principle of justice—requires that they should not be allowed, on the footing of ignorance of these stipulations, to make the shareholders' separate property liable to demands from which it was agreed they should be exempt. By the 89th clause of the deed it is provided, that, as to the shareholders who paid the full amount of their subscriptions to the capital of the company, no further call shall be made in respect of the share or shares held by them. This very plain stipulation was treated by the counsel for the official manager as only meaning that the shareholders should not be called upon to pay the subscribed capital twice over. But if they are, as was gravely argued, to be held liable to calls to the extent of one million, that would be to make them pay, not twice, but ten times over.

It was argued on the 43rd clause of the deed, that it recognised the unlimited liability of the shareholders individually, because it provided that the directors might apply for an Act of Parliament, or letters patent, for limiting the liabilities of the shareholders; and it was asked why this power was given if the liabilities were limited without it? I have already noticed, that the Registration Act so limited the liability, that it was not to be extended, unless under an order to be obtained from a Judge after notice. No Judge could properly make an order extending the liability, without having regard to the stipulations of the registered deed, and the terms of the contract under which the creditor claimed. But letters patent, or an Act of Parliament, might have saved the shareholders from the risk of any application to a Judge.

Therefore, I am of opinion, that, in this case, it has not been established that the shareholders of this company, who have paid the full amount due in respect of their shares of the capital, are liable for the debts; and if they are not liable, the order for this call ought, as to them, to be discharged. But what seems remarkable is, that not a

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Contributories not all necessarily liable for the costs of winding-up.

*Quære*, whether those who have, before the order to wind-up, paid their full share of subscribed capital are not entitled to recover their costs from those who have not paid.

single creditor has made his claim on the footing of the individual liability of those shareholders. As I understand it, they have all claimed merely as creditors of the company, and not as entitled under the 68th section of the Registration Act to make the shareholders liable beyond the amount of subscribed capital.

An attempt was made to support the order for this call, on the ground that, even if the shareholders were not liable for the debts, they are one and all, as being on the list of contributories, liable for the costs of winding-up. That is a view which I cannot entertain. The contributories, although they have not been so arranged, are composed of two very different classes. I can see no just principle on which that class, which includes those who have acquitted themselves of all their obligations to the creditors of the company and to the other shareholders, can be held liable to the costs of this litigation of three years. Whether they may not be entitled to recover their costs in full, or to any extent, against the other class who have not paid what is due from them to the capital of the company, or against the assets of the company when realised under these proceedings, is a question that may occur hereafter.

So far the case might be disposed of as to the motion to discharge the call; but another part of it remains for consideration. One of the grounds on which the motion to discharge the call has been supported is, that the Master was induced to make the call on the representation of the official manager, that he had only been able to recover 12*s.* 1*d.* of the assets of the company during the three years that he had been employed in those proceedings, which are called winding-up its affairs. The order for the call is dated on the 23rd of June, 1853. In the short-hand writer's notes of the proceedings of that day, I find the Master states, as a reason for ordering the call, that the official manager had been going on in this matter ever since 1849 (1850 is meant), and has received only 12*s.* 1*d.*, and that he thought he

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ought to make a call for costs, in order to give the official manager something. The Master also refers to the affidavit of the official manager, and there can be no doubt as to the impression on the Master's mind. There seems no doubt, also, that the counsel for contributories, who were present on that occasion, were not instructed as to the facts. When the Master intimated his intention of making an order for a call, one of the counsel said his client was taken by surprise. Another counsel begged to have notice of the application. The Master, however, referring to the affidavit of the official manager, and his representation that he had only received 12*s.* 1*d.*, made the order.

To give due effect to proceedings under the Winding-up Acts, it is necessary that the Court and the Master should have great confidence in the official manager, and place an almost implicit reliance on his representations. It appears, in this case, the official manager must have been aware, almost from the time when he undertook the duty, that sums of money to a large amount were due and recoverable from contributories who had not paid up the amount due for their shares of the capital of the company. One of the most urgent of his duties was, to take active steps to apply for and compel the payment of these sums. It is too plain that he has neglected his duty in this respect. On the 31st of May, 1853, the Master had made an order, directing him to apply to and take proceedings against those contributories who had not paid. Why that order had not been made nearly three years previously, is not accounted for. This is certain, that, even before the order for the call was made, on the 20th of June, the official manager seems to have found no difficulty in recovering sums from eight of those contributories, and, at the time of the argument on this motion, had received, in respect of the sums so due, to the amount of 561*l.* According to the statement of the official manager to the Master, on the 20th of June, the call for 1*l.*

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per share would produce about 500*l.*; and it was under a belief in the representation to the Master, that the official manager had only received 12*s.* 1*d.*, and ought to have been put in possession of funds to the amount of 500*l.*, and for the purpose of providing that sum, that the call was made. It now turns out, that there had been received, or was receivable, under the previous order of May, 1853, a sum of 561*l.*; and that the call had, on the 18th of November last, placed in the official manager's hand, not the 500*l.* as represented by him, but 1647*l.* 12*s.* 6*d.* The official manager, as an officer of the Court, is entitled to its tender consideration, and to the most favourable construction of his conduct. But a careful examination of the proceedings of the official manager in this case, shews such a failure and neglect of his duties, so much confusion, and such serious mistakes, as cannot be treated with indulgence, without cruelty and injustice to those unfortunate persons, 124 in number, who have been placed upon the list of contributories, and made actors in these misconducted proceedings.

I shall, therefore, direct that the order for a call be discharged; and that the official manager do forthwith repay to Mr. Greenwood, and the other contributories who have paid the full amount of subscribed capital due from them according to the deeds, all sums received by him from them. I shall direct the Master to review the list of contributories settled by him, so as to distinguish and put in a separate class those who have paid up the whole amount due from them in respect of their shares of the capital. There must be a declaration that it does not appear that any of the creditors of the company, who have brought in their claims before the Master, have established any liability against the property or effects of any of the individual shareholders who have paid the full amount of their shares of the subscribed capital of the company according to the deed; and a direction that the Master do proceed to ascertain and state of what the property and assets of the company do consist, having regard to this declaration.

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## WOOD *v.* MIDGLEY.

*Jan.* 12*th.*

A bill for specific performance stated the terms of the agreement for sale of real estate by private contract reduced into writing, but not signed by the defendant himself, who had, however, paid his deposit to the person employed as auctioneer, who signed a receipt referring to the fair copy to be prepared for signature from the rough unsigned memorandum:—*Held*, that the signature by the auctioneer of this receipt, which thus referred to a document which shewed what the agreement was, took the case out of the operation of the Statute of Frauds.

The auctioneer employed to sell on behalf of the vendor, who signs a receipt for the deposit to the purchaser who pays it, acts as agent of both parties; and if the receipt refers to a writing containing the terms of the agreement, the purchaser cannot avail himself of the Statute of Frauds.

THE plaintiffs, Messrs. Joseph Carter Wood and James Frederick Nugent Daniel, were the owners of a public house, situated in the parish of St. Mary Magdalen, Bermondsey, called "The Ship and Camel," held by them for the residue of a term of years.

The defendant was Mr. Thomas Midgley.

The bill stated, that, in May, 1853, the plaintiffs authorised Messrs. Walters, Lovejoy, & Son, auctioneers, to sell the premises for the then unexpired term; that the auctioneers published printed particulars and conditions of sale; and that an auction was held for sale of the premises on the 9th of June, 1853; but that they were not then sold.

The third paragraph of the bill was as follows:—

"The defendant, having seen the printed particulars and conditions of sale, did, in or about the month of July, 1853, enter into a treaty with Messrs. Walters, Lovejoy, & Son, as the agents for and on behalf of the plaintiffs, for the purchase by him of the said lease of the said public house; and, for the purpose of carrying out or concluding such treaty, the defendant did, in company with Mr. William Lovejoy, one of the members of the said firm of Walters, Lovejoy, & Son, on or about the 5th day of the said month of July, call upon Mr. Stephenson, who acted as the solicitor of the plaintiffs, at his office, in Great Queen-street, in the city of Westminster, and did then and there inspect and peruse the said indenture of lease; and, after examining the same, he expressed himself satisfied with the terms thereof; and he, on the same occasion, proceeded to arrange, with the said Mr. William Lovejoy, the terms

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of his said intended purchase, and stated to the said Mr. William Lovejoy his intention to purchase the said lease of the said public house for 1000*l.*, upon the terms and subject to the stipulations contained in the said printed conditions of sale, so far as the same were applicable to a sale by private contract, and to take the furniture, fixtures, and stock in trade in the public house at a valuation; and the said Mr. W. Lovejoy, then and there, on behalf of the plaintiffs, agreed to such purchase; and the defendant and the said Mr. Lovejoy thereupon instructed Mr. Stephenson's managing clerk, Thomas Brown, to reduce into writing the agreement so come to, as aforesaid, between the defendant and the said Mr. Lovejoy; and they agreed to sign the said writing or agreement at the said office of Mr. Stephenson, immediately upon its being prepared, and to wait there (as they accordingly did) while the same was being prepared, in order to sign the same forthwith in the said Mr. Stephenson's office."

The fourth paragraph stated, that "the draft of such agreement was immediately, in pursuance of such instructions as aforesaid, prepared" by Thomas Brown, the managing clerk of the said Mr. Stephenson, in the manner therein mentioned, being such alterations as usually are made in converting conditions of sale, adapted for a sale by auction, into the terms of an agreement for sale by private contract.

The fifth paragraph set forth the draft of the agreement so altered.

The sixth, seventh, and eighth paragraphs of the bill were as follows:—

"Sixth. The said draft or writing was read to the defendant by the said Thomas Brown after the same had been so prepared as aforesaid, and he the defendant fully assented to and approved of the said draft or writing as containing and constituting (as, in fact, the same did) the agreement entered into by him on the 5th day of July as aforesaid; and, after the said agreement had been so put

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into writing, and such writing had been so read to and approved by the defendant as aforesaid, he agreed to sign the same and to pay the sum of 50*l.*, provided therein to be paid by way of deposit upon the signing thereof; but he stated his wish not to be obliged to wait at the office of Mr. Stephenson while the said writing or draft agreement was being copied for signature; and accordingly, upon that ground, he induced the said Mr. Lovejoy to agree to the defendant deferring his signature of the said agreement until the then following morning; and the said Mr. Lovejoy did so agree, in consideration of the defendant promising and agreeing to call upon the said Mr. Lovejoy on the following morning, and then sign the copy of the said writing or agreement; and, in fact, it was part of the contract or agreement for the said purchase entered into on the said 5th day of July, that such contract should be put into writing, and should be signed by the defendant; and the same would, in fact, have been signed by the defendant on the said 5th day of July before leaving the office of the said Mr. Stephenson, but for his agreeing in manner aforesaid to sign the same the next morning, and being accepted at once as the purchaser by the said Mr. Lovejoy, which was upon the faith only of the aforesaid promise. The defendant, before leaving the office of the said Mr. Stephenson, paid to the said Mr. Lovejoy the said deposit of 50*l.* mentioned in the said draft or writing so made out and agreed to as aforesaid and in pursuance and part performance of the same, and requested that a memorandum might be given to him the defendant, expressing the terms of such payment; and accordingly the said Thomas Brown, the clerk of the said Mr. Stephenson, dictated to the said Mr. Lovejoy a memorandum to be signed by the said Mr. Lovejoy on behalf of both of them, the plaintiffs and the defendant; and the memorandum so prepared was accepted by the defendant, and the terms thereof were agreed to by him, and, in fact

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the same was prepared and drawn up by the authority of the defendant as well as of the said Mr. Lovejoy; and the said clerk of the said Mr. Stephenson, in drawing up or dictating the same, acted as the agent or on behalf of both the plaintiffs and the defendant.

"Seventh. The said memorandum so prepared and accepted and agreed to as aforesaid was in the words, or to the effect, following, (that is to say):—

"Memorandum.—Mr. Thomas Midgley has paid to me the sum of 50*l.* as a deposit and in part payment of 1000*l.* for the purchase of the Ship and Camel public-house at Dockhead, the terms to be expressed in an agreement, to be signed as soon as prepared.

"5th of July, 1853. "WILLIAM LOVEJOY."

as by the said memorandum when the defendant shall produce the same (as he ought to do) will appear.

"Eighth. The agreement referred to in the said memorandum was the fair copy, intended and agreed to be made as hereinbefore mentioned, of the said draft or writing so prepared, agreed to, and approved as aforesaid, and which fair copy the defendant so agreed to sign as aforesaid; and the deposit mentioned in the said memorandum was the said deposit mentioned in the said draft or writing, and paid in pursuance thereof as aforesaid; and, in fact, the said memorandum expressed the terms of the contract so made and concluded between the defendant and the said Mr. Lovejoy, as agent of the plaintiffs as aforesaid."

The bill then stated, that two fair copies of the agreement, prepared on the 5th of July, 1853, had been forwarded to the auctioneers, to the intent that the defendant might sign one of them, as he had engaged to do, and that the defendant had not fulfilled his engagement; but that his solicitors, by letter addressed to the auctioneers, stated, that the defendant declined to enter into the agreement, and demanded the return of the 50*l.* which he had paid. And after stating that the defendant threat-

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ened to proceed at law, to enforce the return of the 50*l.*, the prayer of the bill was, that the defendant might be decreed specifically to perform the agreement, and for an injunction restraining him from proceeding at law to enforce the repayment to him of the 50*l.*

*Statement.*

To this bill, the defendant filed a demurrer in the following terms:—

"The defendant demurs in law to the said bill, and for cause of demurrer shews, that it *appears by the bill* that neither the agreement, which is alleged by the bill, and of which the bill prays the specific performance, nor any memorandum or note thereof, was ever signed by this defendant or any other person thereunto by the defendant lawfully authorised, within the meaning of the Statute of Frauds." The demurrer was also general.

*Argument.*

Mr. *Cairns*, in support of the demurrer.—Neither the agreement sought to be enforced, nor any memorandum thereof, is alleged by the bill to have been signed by the defendant "sought to be charged therewith," as is required by the 4th section of the Statute of Frauds. A mere parol agreement is sought to be enforced: and, in *Hollis* v. *Whiteing* (*a*), the defendant pleaded the Statute of Frauds, and the plea was allowed; and in *Whitechurch* v. *Bevis* (*b*), Lord *Thurlow* says, the difference between a plea and a demurrer "is, that, if they have not stated facts in their bill to maintain their part performance, it should be a demurrer, although the practice has been to plead it."

The objection is patent on the bill; the only memorandum signed referred to some agreement *to be* written, and there was no reference to any existing written terms. If the plaintiffs' case is rested on the payment by the defendant of the 50*l.* in part of the purchase-money, that does not take the plaintiffs' case out of the statute. In *Buckmaster* v. *Harrop* (*c*), Lord *Eldon* says, as to part performance, as a ground for enforcing specific performance—

(*a*) 1 Vern. 151. (*b*) 2 Bro. C. C. 559, 564. (*c*) 7 Ves. 341, 346.

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"The ground on which the Court acts is fraud in refusing to perform after performance by the other party;" and again, "the purchaser's refusal, after paying part of his purchase-money, would be no fraud upon the seller, but his own loss."

Mr. *W. D. Lewis*, in support of the bill.—The usual and only proper mode of pleading the Statute of Frauds as a defence to a suit, is by plea, and not by demurrer, and the form of this demurrer shews the reason why a demurrer cannot be supported. The special demurrer avers, that neither the agreement alleged in the bill, nor any note or memorandum thereof, was ever signed by the defendant. Now this is the allegation of a fact which does not appear by the bill; consistently with every statement in the bill, there may have been a signed note or memorandum. This demurrer is then necessarily a speaking demurrer, which the rules of pleading will not allow. Upon this principle of pleading, in *Edsell* v. *Buchannan* (*a*), a demurrer was overruled, because the fact relied on by demurrer did not appear upon the face of the bill. So, in *Smith* v. *Small* (*b*), the bill did not aver the ship to be British built; but it was held that a demurrer, founded on the Ship Registry Act, could not be supported.

The defence to this bill, if taken at all, must be by plea.

So far as the demurrer alleges a general want of equity, it imperfectly and insufficiently raises the same objection of the Statute of Frauds, and is open to the same objection that it imports into it that which does not appear on the face of the bill.

The case stated on the bill alleges conduct by the defendant which was fraudulent on his part. He promised to sign the agreement, and thereby procured the signed memorandum from the auctioneer, which bound the vendor; and the case comes within the principle of *Maxwell* v.

(*a*) 4 Bro. C. C. 254. (*b*) 14 Sim. 119.

*Montacute* (*a*), where Lord *Macclesfield* said, "but if there were any agreement for reducing the same (i. e. parol agreement) into writing, and that is prevented by the fraud and practice of the other party, this Court will, in such case, give relief."

The VICE-CHANCELLOR said, that the objection to the form of the demurrer could not be sustained. The reference to the contents of the bill was not an averment of any new fact necessary to support the demurrer. A speaking demurrer averred some fact as necessary to support the demurrer, which did not appear on the face of the bill, and was, therefore, a bad demurrer. Where, as in this case, no new fact was alleged, the expressions of objection were mere surplusage, and, as held by Sir *John Leach*, did not vitiate the demurrer.

A demurrer, which refers to matter as appearing on the face of the bill, is not bad as a speaking demurrer.

*Secus*, where the demurrer avers a fact necessary to support it, which does not appear on the face of the bill.

Mr. *Cairns* in reply.—On the face of the bill nothing like fraud on the part of the defendant is alleged, so as to bring it within the case of *Maxwell* v. *Montacute* (*a*). *Hollis* v. *Whiteing* (*b*) shews, that a promise to execute a deed or agreement is no ground for dispensing with compliance with the Statute of Frauds. The case, as made by the bill, is, that the plaintiffs' agent was content to trust the promise of the defendant, to do what would be a compliance with the statute, and that the defendant, after consideration, changed his intention, and declined to be bound.

A demurrer is the proper mode of taking advantage of the Statute of Frauds; a special demurrer, of necessity, specifies the objection, and that is all that is done here. For the convenience of the Court it specially points to the Act, with the requisitions of which the plaintiff must comply, to entitle himself to the relief he asks. The general demurrer, at least, is free from the objection that it

(*a*) Prec. in Chanc. 526. (*b*) 1 Vern. 151.

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is a speaking demurrer, and unless the bill shews an agreement in writing, or fraud, a general demurrer for want of equity should prevail.

*Judgment.*

The VICE-CHANCELLOR:—

This is a case of great difficulty, and raises a question that has often perplexed this Court as to the Statute of Frauds, whether the terms of the statute should be strictly enforced, or whether there are such circumstances in the case that fraud would rather be promoted than prevented by allowing the defendant to avail himself of the statute, to evade the performance of an agreement clearly proved, and perfect in all its terms.

It is quite plain, that, unless the terms of the agreement are defined with certainty, and clearly proved, neither purchaser nor vendor can maintain a suit for specific performance. The statements in this bill leave no doubt as to the terms of the agreement. There is no doubt that a complete agreement was made, which, but for the Statute of Frauds, the Court would decree to be specially performed.

It has been said, that, according to the case of *Maxwell* v. *Montacute* (*a*), if, the terms of the agreement having been settled and reduced into writing, the signature by the defendant was only postponed for his convenience or by his contrivance, the defendant cannot successfully insist on the Statute of Frauds. Here the defendant not only had the signature by himself postponed for his own convenience, but contrived, by paying the 50*l.* as a deposit, to get a receipt signed in such a way as to bind the plaintiffs. There is no doubt, on the averments in the bill, that the agreement would have been signed at the time but for the postponement procured by the defendant. It does not appear that the object of the postponement of the signature was to afford to the defendant a *locus pœnitentiæ*, for

(*a*) Prec. in Chanc. 526.

he wanted none; but the postponement took place, and the money was agreed to be taken, solely to save the defendant the inconvenience of waiting at that time. The defendant wished to have a memorandum that he had paid the money; the memorandum was, therefore, drawn up by the clerk of the plaintiffs' solicitor upon instructions from and in the presence of the defendant and Lovejoy, the plaintiffs' auctioneer, and it was signed by Lovejoy the auctioneer. The object of this arrangement for the convenience of the defendant is admitted to have been, that the defendant might at once be accepted as purchaser, and might have evidence that he (the defendant) had so far complied with the terms of the agreement.

No doubt this memorandum is liable to the observations made by counsel, that it refers to a document, the terms of which were to be signed as soon as prepared. It is said with great force, that that reference to an agreement not prepared and not signed is a reference to nothing which can excuse a noncompliance with the provisions of the Statute of Frauds. But the memorandum to be prepared and signed was only the fair copy of the draft as settled and agreed to. The demurrer admits that this draft contained all the terms of the agreement, and, when copied, was to be signed.

Sir *W. Grant*, in *Blagden* v. *Bradbear* (*a*), said, "The proposition, that the auctioneer's receipt may be a note or memorandum of an agreement within the statute is not denied; but for that purpose the receipt must contain in itself, or by reference to something else must shew, what the agreement is." The soundness of that doctrine I have not heard questioned upon any occasion. In the present case, there is no doubt that the receipt signed by the auctioneer refers to an agreement, the terms of which are certain. The agreement which was to be signed as soon as prepared—that is, as soon as copied—was, in fact, only

(*a*) 12 Ves. 466, 471.

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a fair transcription of the draft; and there is no dispute whatever that the draft, consisting of the conditions of sale as altered in writing, contained the exact terms of the agreement. I apprehend that this case is within the decision in *Blagden* v. *Bradbear;* and, depending upon the rule of common sense, that that is certain which by evidence can be rendered certain, I must consider that this receipt is a note or memorandum which refers to that which shews what the agreement was. If so, there is no uncertainty whatever; the terms were agreed upon and were certain, and the terms of the memorandum to be prepared and reduced into writing were also certain, and in a documentary shape.

I am fully aware, that, in arriving at this conclusion, I carry to its fullest extent the principle laid down by Sir *W. Grant* in *Blagden* v. *Bradbear*.

The auctioneer employed by the vendor who signs a receipt for payment of the deposit, is treated as the agent for both parties; and if the receipt in itself, or by reference to something else, enables the Court to ascertain with certainty what the agreement really is, that has been held a sufficient compliance with the statute. That, in fact, is the present case; and I must overrule the demurrer with costs(*a*).

This case was heard on appeal on the 28th of February before the Lords Justices; when their Lordships, holding that the transaction, as stated by the bill, did not amount to a fraud by the defendant, allowed the demurrer.

As the difference between the Courts appears to have been confined to a conclusion of fact, the case has been reported on account of the important principles discussed in the Vice-Chancellor's judgment, and which did not come within the view of the Court of Appeal.

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(*a*) See *Coles* v. *Trecothick*, 9 Ves. 252; *Kemeys* v. *Proctor*, 3 V. & B. 57; *Emmison* v. *Heelis*, 2 Taunt. 38; and *White* v. *Proctor*, 4 Taunt. 209.

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## WARD *v.* WARD.

*Jan. 27th.*

A policy of assurance on his own life was effected by a defaulting trustee with the sanction of the Master, on a proposal to compromise a suit for restoring the trust fund; but the trustee died before the Master made his report, or finally approved of the proposal for compromise:—*Held*, that the proceeds of the policy were not general assets of the trustee, but primarily applicable to compensate the loss by the breach of trust.

By an indenture of settlement executed on the marriage of Henry Ward, since deceased, and Mary his wife, dated the 23rd of March, 1830, certain trust funds belonging to the lady were vested in two trustees, upon trust for the benefit of Mr. Henry Ward and Mary his wife successively for life, and for their children after them. In the year 1834, the original trustees named in the settlement of 1830 retired from the trust, and Sir Samuel Rush Merrick, since deceased, and Mr. William James Ward, a solicitor, were appointed the trustees of the settlement in their stead. The trust funds consisted of 664*l.* 4*s.* 6*d.* Three-and-a Quarter per Cent. Annuities, which were vested in the names of Sir Samuel Rush Merrick and Mr. William James Ward in the Bank books, and of a sum of 400*l.* formerly invested upon mortgage, called Tipton's mortgage, which was afterwards paid off. By the consent of Sir S. R. Merrick the whole of the trust funds came into the hands of Mr. William James Ward, and so remained.

Mr. Henry Ward died in 1838, leaving Mrs. Mary Ward, his widow, him surviving.

Sir S. R. Merrick died in 1848, and Messrs. Abraham Kirkman and T. W. King were his executors.

There were four infant children of Mr. Henry Ward and Mary his wife.

On the 16th of August, 1850, a bill was filed by the four infant children of Mr. Henry Ward and Mary his wife, by Mr. William Washbourne as their next friend, against Mr. William James Ward, Messrs. Kirkman and King, the executors of Sir S. R. Merrick, and Mrs. Mary Ward, the widow. By the bill, the above circumstances were stated, and it was prayed that accounts and inquiries might be directed, to ascertain of what the trust moneys and property subject to the trusts of the indenture of settlement

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consisted, and of what was due from the defendants Mr. William James Ward and the estate of Sir S. R. Merrick respectively, in respect thereof. The Court was asked to declare that the estate of Sir S. R. Merrick was bound to make good to the plaintiffs and the other parties beneficially interested in the settlement what (if any) loss might be sustained in consequence of the trust moneys or property having been allowed by Sir S. R. Merrick, in his lifetime, to come into or remain under the sole control of the defendant William James Ward; and that what on taking the accounts might be found to be due from the defendant William James Ward might be paid by him personally; and that what, on taking the same accounts, might be found to be due from the estate of Sir S. R. Merrick might be paid by the defendants Abraham Kirkman and T. W. King out of the assets of Sir S. R. Merrick, if they should admit assets, and if not, then out of his assets in a due course of administration; and for the appointment of new trustees in the place of Sir S. R. Merrick and the defendant William James Ward.

No answers were put in to this bill, but Mr. William James Ward, who was a solicitor, was desirous that the proceedings should be suspended, and that he should be allowed time to pay the moneys in his hands; and on the 20th of November, 1850, he made a proposal in writing to the plaintiffs in the following terms:—"In consideration of suspending proceedings in this suit, I propose to acknowledge liabilities to the sums of 135*l.* 13*s.* and 636*l.* 16*s.* 8*d.*, being the whole of the distributive share of Mrs. Mary Ward in the residue of her father's estate comprised in her marriage settlement, and the sum of 400*l.* formerly secured on Tipton's mortgage, and also comprised in such settlement, making together the aggregate principal sum of 1172*l.* 9*s.* 8*d.*; and I propose, for better securing the same, to effect an insurance on my own life in the name of Mr. W. Washbourne, the next friend of the plaintiff, for the sum of 1500*l.*; and further, to assure the repayment of the sum

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of 250*l.*, being the first instalment of principal on the said aggregate sum of 1172*l.* 9*s.* 8*d.*, together with 58*l.* 12*s.* 6*d.*, being the interest thereon on the 1st day of October next; and the payment of the like sum of 250*l.*, together with the interest on the unpaid principal of the said aggregate sum of 1172*l.* 9*s.* 8*d.*, on the 1st day of October in every successive year; and the regular payment of the premiums on the said policy as they become due, by a warrant of attorney to confess judgment against me for the sum of 2500*l.* The proposal to be submitted to the Master for his approval, and to be without prejudice to any existing liability in respect of the bond of my father and myself for 500*l.*, also comprised in the said marriage settlement. The executors of Sir S. R. Merrick to appear if necessary."

This proposal of Mr. William James Ward was accepted by Mrs. Mary Ward the defendant, and by Mr. W. Washbourne, on behalf of the plaintiffs, subject to the approval of the Court; and proceedings in the suit were suspended.

By an order, made upon the petition of the plaintiffs on the 15th of February, 1851, it was referred to Sir *W. Horne*, the Master, to inquire and state to the Court whether it would be for the benefit of the plaintiffs that the proposal should be accepted or not, or whether any or what other proposal should be accepted.

On the 11th of March, 1851, the Master required the London agent of the defendant Mr. William James Ward to inquire of him whether he could not give some better security than he had offered in his proposal.

At a subsequent attendance, on the 22nd of March, 1851, Mr. Ward's agent stated to the Master that he was unable to give any better security than that which he had offered; and, it appearing that Mr. Ward had not then insured his life, and that the sum due from him in respect of the trust-moneys exceeded the sum of 1500*l.* mentioned in his proposal, the Master refused to entertain the proposal, until Mr. Ward had effected an insurance on his life

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with the Legal and General Life Assurance Society for the sum of 2000*l.*

Some delay having taken place in effecting such insurance, the London agents of the plaintiffs in the suit made several applications to the London agent of Mr. Ward, requesting that the insurance might be at once effected; and in answer to a letter to such effect, of the 24th of April, 1851, Mr. Ward's agent replied on the 25th of April, 1851, as follows:—"I have communicated your letter of the 24th instant to Mr. Ward, the defendant; and he informs me, in reply, that he intends being in town on Friday next, for the purpose of appearing before the medical officer of the insurance company."

On the 6th of May, 1851, Mr. Ward's agent informed the plaintiffs' agent that Mr. Ward had been before the medical officer of the Legal and General Assurance Society, and promised that, as soon as the proposal should be accepted, he would again write to them.

Upon inquiries subsequently made by the plaintiffs' agents at the Assurance Office, they were informed that Mr. Ward's proposal had been accepted, but that he had not paid the first premium; they, therefore, on the 15th of May, 1851, wrote to Mr. Ward's agent a letter, which was to the following purport:—"We understand that Mr. Ward's proposal for the insurance of his life for 2000*l.* has been accepted; and we, therefore, trust that he will at once pay the premium, and complete the insurance, as we shall take out a warrant to proceed before the Master immediately the offices open."

On the 29th day of May, 1851, a warrant, which had been previously taken out for proceeding on that day, was attended before the Master, when he was informed by the agent for Mr. William James Ward that the insurance would be immediately completed; and the Master required that any further proceedings under the order should be attended before him on behalf of the defendants Messrs. Kirkman and King.

Mr. William James Ward paid the premium, and completed the insurance on his life for 2000*l.* on the 30th of May, 1851, in his own name.

On the 6th of June, 1851, the next warrant for proceeding under the order was attended before the Master by the solicitors of all the parties. The solicitor for the defendants Messrs. Kirkman and King then required on their behalf, that, in the event of the Master reporting in favour of any proposal of the defendant William James Ward, the same should be carried into effect without prejudice to any defence which Messrs. Kirkman and King might have to the suit; but the Master refused to allow any proposal of the defendant William James Ward to be carried into effect on such terms; and he required, as a condition of his approving of any such proposal, that Messrs. Kirkman and King should concur in the necessary deed for carrying the proposal into effect, not only for the purpose of admitting their liability in the same suit, but also in order that they might by such deed covenant to make good the several payments of principal and interest, and the future premiums on the policy of insurance which had been effected, in the event of Mr. William James Ward making default therein. The solicitor for Messrs. Kirkman and King declined to accede to such requisition, and the Master adjourned the proceedings for the purpose of allowing him to re-consider the matter.

No further proceedings were had under the order; and Mr. William James Ward died on the 11th of October, 1851.

Mrs. Harriet Maria Ward was the sole executrix of his will, and she proved the same in March, 1852.

The sum of 2000*l.*, secured by the policy, became payable by the Legal and General Life Assurance Society upon the death of Mr. Ward.

Under these circumstances, the infant plaintiffs in the original suit filed a bill of revivor and supplement by Mr.

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William Washbourne, their next friend, against Mrs. Harriet Maria Ward, the executrix of Mr. William James Ward, the defaulting trustee, certain officers of the Legal and General Assurance Society, Messrs. Kirkman and King, and Mrs. Mary Ward, the mother of the plaintiffs, alleging that the insurance for 2000*l.* on the life of Mr. William James Ward had been effected in the name of Mr. Ward himself, but that it was fully understood and agreed, by and between all parties, that the insurance was to be in lieu of and substitution for the insurance for 1500*l.* mentioned in Mr. Ward's proposal of the 20th of November, 1850, and that the same should be assigned to Mr. William Washbourne, the next friend of the plaintiffs, as soon as the proposal of Mr. William James Ward should be finally approved of by the Court; and that, in the meantime, the same should stand as a security for what might be found due from Mr. William James Ward in the suit; and that, in fact, the Master would have long before reported against the acceptance of the proposal if Mr. Ward had not effected such insurance. The plaintiffs also alleged that the proceedings in the suit against Mr. William James Ward had been suspended, first, in consequence of his having made the proposal, and afterwards, in consequence of his having effected such insurance; and that such suspension of the proceedings was of the utmost importance to Mr. Ward, inasmuch as he was entirely unable to have paid the amount due from him in respect of the trust moneys, and that such inability to pay, and the publicity which would have been given to his breaches of trust i. the suit had proceeded, would have been fatal to his practice as a solicitor, which was very considerable; and also alleging, that, to obviate any doubt that might thereafter arise respecting the insurance, and the plaintiffs' lien thereon, their agents, on the 14th of August, 1851, applied to Mr. Ward's agent to have the policy of insurance deposited in their hands, with a memorandum in writing acknowledging that it was so deposited to secure what might be

found due from Mr. Ward in the suit, and that his agent had promised to mention the subject to him, but that he was prevented doing so by the serious illness of Mr. Ward, which terminated in his death.

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The prayer was for the usual revivor of the suit against Mrs. Harriet Maria Ward, and for a declaration that the plaintiffs and the other persons interested under the said settlement were entitled to a lien on the moneys due on the said policy for the amount which should be so found due from the estate of Mr. Ward; and that the policy moneys might be secured in Court; and for an injunction restraining Mrs. Harriet Maria Ward from receiving and from commencing any action at law against the Assurance Society in respect of the policy moneys; and also for restraining the Assurance Society from paying the same to the defendant Mrs. Harriet Maria Ward.

The defendant, Mrs. Harriet Maria Ward, by her answer, submitted that the reference to the Master not having been proceeded with at the time of the death of Mr. William James Ward further than it was, and that the Master never having made his report pursuant to the order, and the insurance for 2000*l.* having been effected in the name of Mr. William James Ward himself, the right to that sum had vested in herself as his personal representative; and she submitted that the insurance for 2000*l.* was not in substitution for the insurance for 1500*l.* mentioned in the proposal of Mr. William James Ward, of the 20th of November, 1850. She denied that it was understood or agreed between any of the parties that the insurance for 2000*l.*, or the policy for the same, should be assigned to Mr. William Washbourne, or to any other person, when the proposal should be finally approved of by the Court, or that it should stand and be a security for what might be found due from the defendant William James Ward in the suit; and she submitted that no binding agreement for the suspension of the proceedings was ever made on behalf of the

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plaintiffs; and that the persons acting on behalf of the plaintiffs had been always at liberty to prosecute the proceedings when they might think fit.

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It also appeared from the answer of this defendant, that two creditor suits had been instituted for the administration of the estate of Mr. Ward, under the direction of the Court; that he had died entirely insolvent; and that, on the 15th of April, 1852, upon a motion coming on for an injunction before Sir *James Parker*, an arrangement was made, by which the assurance company paid to Mrs. Harriet Maria Ward 94*l.* 11*s.* 5*d.*, on her undertaking to employ the same in payment of the probate duty and proctor's charges on proving Mr. Ward's will; and that, on payment of the balance of the 2000*l.* into Court in this cause, the officers of the assurance company were dismissed.

*Argument.*

Mr. *Wigram* and Mr. *Amphlett* for the plaintiffs, submitted that the plaintiffs were entitled to have the sum representing the 2000*l.*, received on the policy, and now in Court, appropriated in the first place to make good the sums due from Mr. Ward under his breaches of trust. If a policy for the sum of 1500*l.* only had been effected, it would clearly have been subject to a lien to make good the plaintiffs' fund; but the transactions shew that all parties, in fact, treated and considered the insurance for 2000*l.* as being in lieu of the insurance in the sum of 1500*l.*; and if the latter was charged, the tacit agreement substituting the 2000*l.* for the 1500*l.*, charged the 2000*l.* It was a matter of plain inference from the facts.

If the charge on the fund did not exist, then the estate of Sir S. R. Merrick was liable to make good the defalcations of Mr. Ward, the funds having got into Mr. Ward's uncontrolled possession with the concurrence of Sir S. R. Merrick.

Mr. *Bacon* and Mr. *Haynes* for Mrs. Harriet Maria Ward,

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the executrix of Mr. Ward, the defaulting trustee.—The 2000*l.* arising from the insurance was payable to Mrs Ward as the personal representative of Mr. Ward. The presumption is, that the amount secured was his own. The attempt to make out the plaintiffs' equity to a lien on the amount fails. It may be admitted, that Mr. Ward proposed terms of compromise; but the Master rejected them, and suggested other terms; and it does not appear that the defendant Ward ever agreed to them, whilst the Master himself declared he should not assent to the terms, except with the concurrence by the representatives of Sir S. W. Merrick, which their solicitor expressly declined to give. There is, therefore, no contract by any one, upon which any party can fix, to charge the proceeds of the 2000*l.* with a lien on behalf of the plaintiffs. All rested in proposal,—it was all negotiation, and it did not ripen into an agreement. But even if it should be held to have been an agreement, it was an agreement by infants with Mr. Ward; and since there could be no mutuality, it was in fact no agreement enforceable in equity: *Flight* v. *Bolland* (*a*); and if the right of lien be rested on the sanction of the terms by the Master, that sanction was never obtained.

Mr. *Cooper*, Mr. *Rogers*, and Mr. *Ellis*, for the representatives of Sir S. R. Merrick, were proceeding to argue the question of Sir S. R. Merrick's liability for the breaches of trust; but they were stopped by the Court.

*Judgment.*

The VICE-CHANCELLOR said:—The counsel for Mrs. Ward, who is here representing the interests of the late Mr. Ward's creditors, have properly discharged their duty by endeavouring to sustain the proposition, that Mrs. Ward was entitled to the money received on the policy, as part

(*a*) 4 Russ. 298.

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of his general assets. They contend that there was no such agreement as to bind Mr. Ward, inasmuch as the proposal was not so completely accepted as to make it binding on him. I think it was complete as far as regards him. The only question is, as to the other parties. There is no doubt about the facts.

The original bill was filed to make both the trustees liable for breach of trust. After that Mr. Ward proposed certain terms for putting an end to the suit, the principal term being that he should effect an insurance on his own life for 1500*l.* That proposal was so far accepted, that, on the application of the plaintiffs, there was a reference to the Master to inquire, on behalf of the infants, whether it would be for the benefit of the infant plaintiffs that the proposal should be accepted The Master seems to have approved of the proposal in every respect, except as to the amount for which the policy was proposed to be effected, and he required the insurance to be for the sum of 2000*l.* instead of 1500*l.* This was an alteration that introduced no new term as to the principle of the arrangement, but only as to the amount; and it was so completely accepted that the policy for this amount so proposed by the Master was actually effected; and the only thing that remained was to prepare a proper deed; and the Master required the other trustee to attend for the purpose. Now, although this insurance was in Mr. Ward's name, yet being effected for a specific purpose on his own proposal, and with the Master's approbation, and in the mode which the Master thought proper, and for the benefit of all parties, I must hold that the policy was, in his (Ward's) hands, as effectually dedicated to the purpose as if it had been for 1500*l.*; and the plaintiffs have the same rights against Ward's representatives, as completely as they would have had against Ward if he were alive.

There is another view of the case, which would make it impossible to allow the money produced by the policy to

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*Judgment.*

go to the general body of creditors. How had the money been produced? It had been received upon a policy which had been effected as the fruit of this litigation. It is the produce of the diligence of these plaintiffs; and it would be inequitable to deprive them of it. But it was said, that the plaintiffs should be deprived of it, because the policy was in the hands of Ward's personal representative, who was legally entitled to receive the amount. But where the cestui que trust is entitled to relief against his trustee, which he seeks, as plaintiff, to obtain, and a particular fund is created to answer the relief, and so far appropriated to make good the demand, it would be a very dangerous doctrine to hold, that the plaintiff should lose the fruit of his diligence.

The Court must declare that the policy monies are subject to replace such sums as are due from the estate of Mr. W. J. Ward in respect of the funds in his hands under the settlement. The plaintiffs' costs of both suits, and the costs of Mrs. Ward, as executrix of the supplemental suit, must be paid, in the first place, out of the fund and out of what is due from Mr. Ward, the deceased trustee, for principal and interest; and the Court will direct payment of what shall be found due to be made out of the residue of the fund. If there be any surplus let it be paid to the executrix, she undertaking, in case of the fund being insufficient, to apply for a return of probate duty, and to pay the same into Court in this cause.

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*Feb.* 12*th.*

## JOHNSON *v.* WEBSTER.

A., being entitled in fee to real estates, subject to a trust to raise 6000*l.* for B., and, in the event of her death without children, for A., on his marriage, conveyed the estates to the trustees of his marriage settlement, subject to the trust to raise the 6000*l.* on the trusts (in the will creating it) mentioned, and died living B. On B.'s death without children, A.'s representative filed a bill to establish the charge. The Court held that the charge was subsisting, and directed the principal, interest, and costs to be raised by a sale or mortgage of the real estate.

SIR GODFREY WEBSTER, Bart. (No. 1), by his will, bearing date the 15th of November, 1779, directed his debts, legacies, and funeral expenses to be paid and satisfied; and in case his personal estate should not be sufficient for that purpose, he thereby charged his real estate, devised to his eldest son Godfrey Webster, with the payment thereof. The testator gave to his wife an annual rent charge in lieu of dower, and then made the following gift:—

I give and devise unto Charles Nairn, of Milkhouse, Kent, and John Campbell, of Lincoln's Inn, Esquires, and to the survivor of them, their executors and administrators, the sum of 6000*l.*, in trust, that they, or the survivor of them, or the executor or administrator of such survivor, shall pay or cause to be paid the said sum of 6000*l.* unto my daughter Elizabeth Webster, on the day of her marriage; and until that event, I direct the said sum to carry interest at 5*l.* per cent., and I direct my son Godfrey Webster to pay such interest quarterly; and in case such interest shall be unpaid forty days after any quarterly day of payment, it shall be lawful for my said daughter Elizabeth to take and receive the rents and profits for her own use and benefit, until the said Elizabeth shall be paid and satisfied all arrears of interest, and all costs and charges and damages sustained by reason of the non-payment thereof; and I declare that I give the said sum of 6000*l.* to my said daughter over and above all sums of money or other provision to which she may be entitled under my marriage settlement or by any other means whatsoever; but I hereby declare, that, in case my daughter shall die unmarried, or if being married she shall die without leaving any issue living at the time of her death, the said sum

of 6000*l.* shall sink into the residue of my personal estate, and shall go to my son Godfrey Webster."

The testator, having given other legacies, devised his real estate to his eldest son Godfrey Webster, his heirs and assigns for ever, charged and chargeable nevertheless with payment of all or so much of his debts, legacies, portions, and funeral expenses as his personal estate should not be sufficient to satisfy and discharge. The residue of his personal estate not thereinbefore disposed of, he bequeathed to his son Godfrey Webster.

By a codicil to his will, dated the 17th of March, 1780, reciting the above gifts, he declared his will to be, that the jointure, portions, legacies, debts, and funeral expenses should be charged on his manors of Robertbridge, Battle, &c. &c., within the rape of Hastings, in the county of Sussex, and that his eldest son Godfrey Webster should hold his other estates free and discharged from such charges.

The testator died shortly afterwards, without revoking his said will, which was duly proved. His personal estate was insufficient, after payment of prior charges, to satisfy any part of the sum of 6000*l.*

From the death of the testator, Sir Godfrey Webster (No. 1), interest at 5*l.* per cent. was paid to his daughter Elizabeth out of the rents and profits of the real estate, until her death in 1833.

The 6000*l.* was never in fact raised by the trustees.

By indenture of lease and release, dated the 22nd and 23rd of June, 1786, executed upon the marriage of the testator's eldest son, Sir Godfrey Webster (No. 2), with Elizabeth Vassall, reciting, that the said sum of 6000*l.* given to the said Charles Nairn and John Campbell was then unpaid; and reciting, that, on the death of the said testator, the then Sir Godrey Webster (No. 2) was seised of the said hereditaments, subject inter alia to the payment of the legacy of 6000*l.*; and reciting, that Sir Godfrey Webster (No. 2), being so seised, was desirous that no part of certain sums, charged

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*Statement.*

by the will of Sir Godfrey Webster (No. 1), should be raised thereout for his benefit, but that, on the contrary, the same should sink into the said real estate; and reciting, that a marriage was agreed on between the said Sir Godfrey Webster (No. 2) and the said Elizabeth Vassall, and that, upon the treaty for the said marriage, it was agreed that the said Sir Godfrey Webster (No. 2) should convey and assure his hereditaments in the county of Sussex, whereto he was entitled under the will of the testator, subject inter alia to the payment of the said 6000*l.*—It was witnessed, that, in consideration of the said intended marriage, all those manors &c. were granted and released to the said Rose Fuller and Robert Cooper Lee, to the several uses thereinafter declared concerning the same, freed and absolutely acquitted, exonerated, and for ever discharged of and from all claims and demands whatsoever of the said Sir Godfrey Webster (No. 2), into or out of the same premises under the will of the testator, in respect of the two several sums of 10,000*l.* and 1400*l.*, under the indenture of 1775 directed to be raised by the said Charles Nairn for the benefit of the settlor, but subject, as to such parts of the said manors and hereditaments as by the will of the said testator were charged with payment of the portions and legacies given by the said will to the said Charles Nairn and John Campbell of the said sum of 6000*l.* and of the said 1000*l.*, part of the said legacy or sum of 2000*l.* by the said will of the said Sir Godfrey Webster (No. 1), the testator, respectively given to the said Charles Nairn and John Campbell, their executors, administrators, and assigns, upon the trusts therein mentioned concerning the said sums of 6000*l.* and 2000*l.* respectively, together with all interest then due and to grow due for and in respect of the said several sums of 6000*l.* and 1000*l.*

The marriage was solemnised on the 26th of June, 1786. Sir Godfrey Webster (No. 2) died in 1800, having, by his

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will, bequeathed the whole of his personal estate to his mother Dame Elizabeth Webster.

The estates descended to his eldest son Sir Godfrey Webster (No. 3).

*Statement.*

Prior to 1800, Elizabeth Webster (the legatee of the 6000*l.*) married Mr. Thomas Chaplin.

By her will, dated the 14th of May, 1802, Dame Elizabeth Webster bequeathed the whole of her personal estate to her daughter Elizabeth Chaplin.

By her will, dated the 29th of August, 1816, Mrs. Chaplin (her husband being then dead) bequeathed her personal estates to certain persons, through whom the present plaintiffs claimed. She died on the 28th of October, 1833. Early in 1853 the plaintiffs filed this bill, praying for a declaration,

1. That the said sum of 6000*l.* was a valid and subsisting charge on the real estate.

2. That the plaintiffs were entitled to interest for at least six years.

3. For an account.

4. That the said sum of 6000*l.* might be raised by a sale or mortgage of a competent part of the estate, &c. &c.

*Argument.*

Mr. *Bacon* and Mr. *Schomberg*, for the bill, submitted, that there was a subsisting charge unless it had been merged; but that Sir Godfrey Webster never had more than a contingent right to the sum of 6000*l.* upon the death of his sister, without leaving children at her death.

Mr. *Malins* and Mr. *Prior* for the plaintiffs.—The testator contemplated that the legacy should be paid out of the personal estate, if sufficient, clearly indicating that it was not his intention to burden the land with this charge unless absolutely necessary. Then followed a direction, that the legacy should be paid to his daughter on the day of her marriage, so that, if she never married, she had no power

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*Argument.*

to call upon the trustees for payment of the principal moneys given by the will. Then followed a further qualification, that, unless she left children living at her decease, the legacy should vest in the same person as the land out of which it was to be raised, or, in other words, the property should be in the same situation as if no such charge had been created. In putting a construction on a will, the Court always regarded the substance of the gift more than the precise form in which it was made. Adopting this principle, the true construction of the gift was a gift of the interest of 6000*l.* to his daughter, with a direction to the trustees to raise that sum out of his real estate in the event of his daughter leaving children living at her decease.

The case of *Walpole* v. *Maclintock* (*a*) was cited.

Mr. *W. H. Harrison* appeared for the Dowager Lady Webster, who was in the same interest with the defendant.

Mr. *Bacon* was not called on to reply.

*Judgment.*

The VICE-CHANCELLOR, having recapitulated the facts above given, said, that the argument was maintained upon an assumption that the gift was not absolute, an assumption which, in his opinion, was unfounded. He thought there was an absolute gift of the sum of 6000*l.*, and he should hold that it was a valid charge upon the real estate, and should order a sufficient sum to cover the principal, six years' interest, and costs, to be raised by a sale or mortgage of the real estate.

(*a*) 7 Ir. Eq. Rep. 353.

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*Feb.* 16*th.*

## DIPLOCK *v.* HAMMOND.

## THE GUARDIANS OF THE POOR OF ST. MARY'S, NEWINGTON *v.* HAMMOND.

THE defendant George Hammond, previously to October, 1852, contracted with the guardians of the poor of St. Mary's Newington, to construct certain works in connection with the poor-house, for a sum of 365*l.* From the 16th of October to the 1st of February, 1853, Hammond, with the knowledge of Joseph Burgess, the clerk of the guardians, obtained from Diplock a loan exceeding 365*l.*; and, on the 1st of February, 1853, Diplock received from Hammond the following document.—

"To the Governors and Guardians of St. Mary, Newington.

"Walworth, February 1st, 1853.

"Gentlemen,—I hereby authorise you to pay to Mr. John Diplock, of the Walworth Road, the sum of 365*l.*, being the amount of my contract at the new workhouse, Walworth Villa, Mr. Diplock having advanced me that sum.

I remain, Gentlemen, your obedient servant,

GEORGE HAMMOND."

At the same time, Hammond delivered to the plaintiff a stamped receipt, as follows:—

"London,—

"Received of the Governors and Guardians of St. Mary, Newington, the sum of 365*l.*, for work done as per contract at the new workhouse, Walworth Villa."

"£365. "GEORGE HAMMOND."

On the following day the plaintiff gave notice to the clerk of the guardians, of the assignment to the plaintiff of the amount due from them to Hammond; and on the

A., having obtained a loan from B., gave him the following instrument, addressed to his (A.'s) debtor—"I hereby authorise you to pay B. 365*l.*, being the amount of my contract, B. having advanced me that sum." (signed) "A." —*Held* a valid equitable assignment, and not requiring a stamp as an order for payment of money under 55 Geo. 3, c. 184.

Where the stakeholder alleged that the fund in his hands was less than one of the claimants asserts to be the amount, a bill of interpleader cannot be maintained. Nor where, before it was filed, one of the claimants had informed the stakeholder that he would file a bill to enforce his demand; and did in fact file his bill on the same day with the interpleader bill, making the only other claimant and the stakeholder parties.

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*Statement.*

12th of February, the plaintiff's solicitor, Mr. Gedye, wrote to the guardians requesting payment of the amount, and informing them that the plaintiff had made advances to Hammond, entirely on the faith of the lien upon the money due from them. On the 16th of February Hammond wrote to the guardians, giving them notice not to pay the debt assigned to the plaintiff, and repudiating the receipt. On the 18th, Messrs. Chester wrote to Mr. Gedye, stating that the guardians had delegated no authority to their clerk to become trustee for the monies due to Mr. Hammond, and inclosing the notice of the 16th of February, which was to the following effect:—

"To the Governors and Guardians of the Poor of the Parish of St. Mary, Newington, Surrey.

"I hereby give you notice not to pay over the sum of 365*l.*, or any part thereof, due from your Board to me for work done at the workhouse as per contract, to any other person than myself. I give you this notice, in consequence of my having in error signed a receipt for the above-mentioned sum, and handed the same to Mr. Diplock, Grocer, Walworth Road, which receipt I now wholly repudiate: and I further beg to inform you, that the said Mr. Diplock is not nor is any other person my agent, for the purpose of asking or obtaining payment of the said sum, or any part thereof.

GEORGE HAMMOND."

Dated this 16th of February, 1853."

On the 23rd of February, Hammond, by a deed, assigned the money due on the contract to the defendant Booth, who the next day gave notice of such assignment to the guardians and left with their clerk a copy of the deed.

On the 23rd and 30th of October, 1852, upon the commencement of the works, the clerk to the guardians advanced two sums of 20*l.* to Hammond on account.

A correspondence was carried on for some time between the solicitors of the plaintiff and of the defendant Booth,

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and the solicitors of the Board, in which both claimants called on the Board to satisfy their demands. On the 9th of April, Mr. Gedye, the plaintiff's solicitor, addressed a letter to the solicitors of the Board, and also to the solicitor of Booth, complaining of the course that had been pursued, and stating, that, unless the plaintiff's claim was recognised before the ensuing Wednesday, he would proceed to establish his claim in the Court of Chancery. In reply to this communication, the solicitor of the guardians wrote a letter to Mr. Gedye, stating that the object of the guardians had been to pursue an even course between the conflicting claims of the parties; that the papers were then before counsel, and when the opinion had been obtained, the plaintiff should be acquainted with the result.

*Statement.*

On the 16th of April, the plaintiff Diplock filed his bill to establish the assignment; and about half-an-hour later on the same day, the interpleader bill of the guardians was put on the file, stating the agreement with the guardians for the sum of 365*l.*, that the sum of 40*l.* had been paid by them on account, setting forth the documents, offering to bring the money into Court, and praying that the plaintiffs might interplead as to the sum of 325*l.*

Both causes were brought on together.

*Argument.*

Mr. *Malins* and Mr. *J. H. Palmer* appeared for the plaintiff Diplock, and submitted that the instrument of the 1st of February, 1853, was a valid assignment, prior in point of date to the assignment to the defendant Booth.

Mr. *Swanston* and Mr. *G. H. Collins,* for the guardians, said that they raised no question as to the amount to be brought into Court. They did not call on either party to accept that amount, but only asked that they might interplead. The defendants might proceed against the guardians to recover any further sum, if they could. In all the cases where an interpleader suit had failed, a contention was raised by the bill. If the right to file an interpleader bill

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*Argument.*

depended on whether the defendants did not think fit to dispute the amount, it would be difficult for a stakeholder ever to file such a bill.—They claimed also to be entitled to their costs in both suits. The case of *Crawford* v. *Fisher* (*a*) was cited.

Mr. *Craig* and Mr. *Welfold* for the defendant Booth.—The alleged assignment to the plaintiff was invalid for want of a stamp. It was an order for the payment of a sum of money out of a particular fund, and was delivered to the payee, and, therefore, required a stamp, under the 55 Geo. 3, c. 184 (*b*).

In *Emly* v. *Collins* (*c*) and *Butts* v. *Swann* (*d*), it was held, that a similar instrument was void for want of an inland bill stamp. In *Firbank* v. *Bell* (*e*), the instrument was simply an order to pay 1500*l.* out of the proceeds of a cargo of mahogany; but it was held invalid for want of a bill stamp. In *Lord Braybrooke* v. *Meredith* (*f*), the language was, "please remit 700*l.* and charge it to my account;" and it was held, that it required a bill stamp, under the 55 Geo. 3, c. 184, and was, therefore, void.—They cited also *Parsons* v. *Middleton* (*g*).

Mr. *Speed* appeared for the defendant Hammond.

(*a*) 16 Sim. 479.

(*b*) The language of the statute (Schedule, Pt. 1, tit. "Inland Bill," &c,), is as follows:—"The following instruments shall be deemed and taken to be inland bills, drafts, or orders for the payment of money, within the intent and meaning of this Schedule: viz. All bills, drafts, or orders for the payment of any sum of money out of any particular fund, which may or may not be available, or upon any condition or contingency, which may or may not be performed or happen; if the same shall be made payable to the bearer or to order, or if the same shall be delivered to the payee, or some person on his or her behalf."

(*c*) 6 M. & Selw. 144.

(*d*) 2 Bro. & B. 78.

(*e*) 1 B. & Ald. 36.

(*f*) 13 Sim. 271.

(*g*) 6 Hare, 261.

Mr. *Malins* referred to the cases of *Lett* v. *Morris*(*a*), *Jones* v. *Simpson*(*b*), *Lestrange* v. *Lestrange*(*c*), *Rodick* v. *Gandell*(*d*).

The VICE-CHANCELLOR:—

The language of the Act is perfectly clear: it requires a stamp upon every instrument which is an order for the payment of a sum of money *out of a particular fund*. Such an instrument is not an assignment of the fund, but an order for the payment of money. An order *to pay or transfer the whole fund* is an equitable assignment of the whole, and is not such an instrument as the Act describes. Here the instrument directs the whole of a particular fund to be transferred to the plaintiff, and is, therefore, a clear equitable assignment, and is not liable to a stamp as a bill or note. In the case of *Lord Braybrooke* v. *Meredith*, which was an order to pay a sum out of a particular fund, the Vice-Chancellor, with reluctance, allowed it to prevail, but refused to give costs.

The answer, in this case, admits the instrument; so that, unless it is necessary to prove or use it as an exhibit, it need not be stamped as an agreement.

As to the interpleader suit.—In my opinion this is not maintainable as a bill of interpleader. The principle of interpleader is, that the holder of a fund in which he has no interest, but which is claimed by two parties, shall not be harassed by claims made upon him by the adverse parties, who threaten to sue him alone, instead of proceeding to litigate their rights between themselves. A stakeholder who cannot get the claimants to settle the question between themselves, but apprehends that he may be attacked by one or more of the claimants, is entitled to

(*a*) 4 Sim. 607.
(*b*) 3 D. & R. 545.
(*c*) 13 Beav. 281.
(*d*) 1 De G., Mac., & G. 761.

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*Judgment.*

come to this Court to compel them to interplead. It is essential that the plaintiff be a mere stakeholder, who asserts no interest of his own in the fund. But in this case the plaintiffs in the interpleader suit pray that the defendants may interplead as to a sum of 325*l.*, whereas it appears from their own bill that the claim made against them is of a sum of 365*l.* I think the circumstance, that this question is raised as to the amount of the fund, deprives them of the right to maintain this as an interpleader suit. Sir *J. Leach* held, that a claim by the stakeholder to deduct from the fund in his hands a small sum for warehouse rent prevented him from maintaining a bill of interpleader.

But there is another equally fatal objection. So far from intending to harass the guardians by proceeding against them, instead of litigating his right with the other claimants, it appears, that on the 19th of April Mr. Diplock's solicitor told the guardians that he would no longer be trifled with, and that unless his demands were complied with immediately, he would file a bill in the Court of Chancery; and, accordingly, he filed his bill, making the other claimants defendants. But, although the guardians knew that the various claimants were about to litigate the question between themselves, they filed this bill on the very same day on which the bill was filed by one of the claimants against all parties.

Then there remains the question, whether the writing of the 1st of February, 1853, is a valid assignment in equity of the debt due from the guardians to the assignor Hammond: about that I feel no doubt. The plaintiff is an equitable assignee with notice, it is admitted his title is prior, in point of date, to the security held by Booth. I shall direct, therefore, accounts to be taken as between Hammond and the guardians, and as between Hammond and the plaintiff, and reserve the costs.

Affd. 5 H. L. Cas. 320.

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## HATCH *v.* SEARLES.

STANWAY'S CASE.
CONWAY'S CASE.

*Feb. 8th, 9th, 22nd.*

AN order to administer the estate of a testator, Isaac Searles, under the direction of the Court, having been made, creditors and claimants upon the estate were, by advertisements, required to come in and prove their claims before the chief clerk. Mr. Stanway went in before the chief clerk and sought to prove as a creditor upon a bill of exchange for 100*l.*, dated the 18th day of February, 1852, drawn by Mr. Curtis upon, and addressed to, Mr. Isaac Searles, the testator, as of "Old Kent Road," and accepted by the testator for 100*l.*, and payable two months after date, to the order of Mr. Curtis, and by him indorsed to a Mr. Wallis, and by him indorsed to Mr. Stanway.

Mr. Conway also sought to prove as a creditor on the estate upon a bill of exchange for 50*l.*, dated the 12th of February, 1852, drawn by Mr. Curtis upon, and addressed to, the testator as of "Old Kent Road," and accepted by the testator, and payable six months after date; this bill, having been indorsed by Mr. Curtis, was by him paid to Mr. Conway.

The chief clerk, upon the circumstances in evidence before him, disallowed both claims.

These cases now came on for argument by adjournment from Chambers, by way of motion, that the certificate of the chief clerk might be varied by allowing these claims.

The evidence upon these claims was conflicting, but the following are the facts as they appeared to the Court.

Where value is given for a blank acceptance, the authority to fill it up, being coupled with an interest, is not revoked by death; but where there is no such interest, the authority to fill up and negotiate is terminated by the death of the acceptor.

Giving a blank acceptance is only primâ facie evidence of an authority to the person to whom it is given to fill up the bill for the amount, to which the stamp extends; and where the holder of a bill takes it with notice of a circumstance of suspicion, he can be in no better situation than the drawer or indorser, who had given no value for the bill.

The holder of a bill, who, without any express notice of any circumstance of suspicion, took the bill, not in the ordinary course of business and not relying on the security, required evidence of title in the drawer to negotiate the bill, which deceived him, has only his remedy against the drawer personally who deceived him, and he can have no better title on the bill than the drawer had.

A person, claiming to be a creditor under a decree to administer the testator's estate, having failed to establish his debt, after a long and expensive examination of witnesses, was ordered to pay the costs of the proceedings.

Geomans v Haynes 2 Y. Beav. 127

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*Statement.*

The testator, a young medical student, was on terms of intimacy with Mr. Curtis.

A few days before the testator left England for Demerara, Mr. Curtis being in want of money, the testator, in order to assist Mr. Curtis, at his request wrote his name across two blank pieces of paper, impressed as bills of exchange with a stamp, for 3*s.* 6*d.* each, and gave them to Mr. Curtis. It was a matter in dispute, whether they were absolute gifts to Mr. Curtis, or merely authorities to use the testator's name for the accommodation of Curtis; and it was also in dispute, whether Mr. Curtis was in any respect a creditor of the testator for sums paid for him. The testator left Southampton on the 17th of February, 1852, for Demerara, where he died on the 11th of April following. Mr. Curtis retained the two acceptances in his possession in blank until the 18th of April, 1852. On that day he filled up the acceptance for 100*l.*, in the presence of Mr. Wallis and Mr. Stanway; Mr. Wallis discounted the bill for 100*l.*, not giving to Curtis the full cash for the amount less ordinary discount, but taking the amount into a running account between them, and making him some small advance on the transaction. Mr. Wallis discounted the bill with Mr. Stanway before it became due. On the 21st of April the bill became due, and was not paid. Under these circumstances, Mr. Stanway preferred the present claim to be admitted a creditor for the amount of the bill upon the testator's estate.

Mr. Curtis, in the month of April, 1852, discounted the bill for 50*l.* with Mr. Conway. It did not appear whether Mr. Conway knew of the circumstances under which this acceptance had been given; but, not being satisfied with the bill, he took from Mr. Curtis a letter addressed to him by the testator, dated the 28th of October, 1851, as a document shewing that the testator and Curtis were on such terms as to justify the latter in negotiating the bill.

It appeared, that, although the testator was dead prior

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*Statement.*

to the date when Curtis filled up the acceptances, the death of the testator was not known in England until after Mr. Stanway and Mr. Conway had discounted the bills. The address of the testator, as given in the bills, of "Old Kent Road," was the last address of the testator previous to his leaving England, but it was a mere lodging, and ceased on his leaving England to be his address.

Both motions now came on together.

*Argument.*

Mr. *T. H Terrell* in support of Mr. Stanway's claim; and Mr. *Huddlestone* in support of Mr. Conway's claim.—The gift of these two blank acceptances to Curtis was an authority to him to fill them up to any amount which the stamp impressed on them would cover at any time. The right to fill up and negotiate was complete in Curtis from the time when the blank acceptances were given to him: *Tate* v. *Hibbert* (*a*). In *Collis* v. *Emett* (*b*), where an acceptor, having signed his name to a blank paper duly stamped, and having delivered it to B., who, having the acceptor's authority, drew a bill payable to a fictitious payee or order, and indorsed it over to an indorsee for value, without notice, an action by the indorsee against the acceptor as upon a bill payable to the bearer was sustained. In *Russel* v *Langstaffe* (*c*), after a very full discussion and consideration of the authorities, it was held, that an indorsement written on a blank note or check will afterwards bind the indorser for any sum and time of payment which the person to whom he entrusts the note chooses to insert in it. In *Schultz* v. *Ashley* (*d*), the decision was the same. The observations of Chief Justice *Tindal* in that case are very applicable to the present. The

(*a*) 2 Ves. jun. 111.
(*b*) 1 H. Bla. 313.
(*c*) 2 Doug. 514.
(*d*) 2 Bing. N. C. 544.

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*Argument.*

same proposition is laid down very expressly in *Montague* v. *Perkins* (*a*); and this view of the law is confirmed by *Temple* v. *Pullen* (*b*). As soon as the acceptance was signed and given into the hands of Curtis, it became binding on the testator, and the authority was irrevocable (*c*): *The Queen* v. *Burch* (*d*), *Thornton* v. *Dick* (*e*), *Cox* v. *Troy* (*f*).

But it may be contended, that, as the bills were dated after the death of the acceptor, that affects their validity. It is not suggested that Curtis knew of the testator's death when he perfected the bills of exchange, and negotiated them; whatever he did was in that respect bonâ fide. That act had relation to the time when the acceptance was given, and the bills must be considered as having been perfected then. On the authority of *Snaith* v. *Mingay* (*g*), where, the question being whether a bill of exchange was an Irish or an English instrument, it was held to have been an Irish instrument, because it was an instrument as of the date and place when and where it was signed and indorsed, though it was subsequently filled up and signed by the drawers in England.

*Usher* v. *Douncey* (*h*) is in principle the same as the present cases. There a partner in a firm drew a bill of exchange in blank in the partnership name, payable to their order, and duly indorsed it and gave it to a clerk to fill up and use for the partnership purposes, and died; the clerk filled up the bill of a date prior to the deceased partner's death, and negotiated it; and it was held that the surviving partners were liable as drawers of the bill to a bonâ fide indorsee for value, though no value for it had come to their hands. The only difference is, that there a date prior to the death of the partner was inserted;

(*a*) 22 L. J., C. P., 187.
(*b*) 8 Exch. 389.
(*c*) See Bayley on Bills, edit. by Dowdeswell, 204.
(*d*) 1 Low. & W., B. C., 56.
(*e*) 4 Esp. 270.
(*f*) 5 B. & Ald. 474.
(*g*) 1 M. & Selw. 87.
(*h*) 4 Camp. 97.

but, on the authority of *Snaith* v. *Mingay*, whatever date was inserted, the act has relation to the parting with the document by the party to be charged.

The claimants assume, that it appears on the evidence that Mr. Curtis had an interest in the acceptance as well as an authority; in such case, it is clear from the principles which are established in the law of agency, irrespectively of the lex mercatoria, that it was competent for him to fill up the bills after the death of the acceptor; the reason for this is well stated in Story on Agency (*a*); it is this, that the power given to an agent, coupled with an interest, is rather an agreement that the agent may transfer the property vested in him free from any equities of the principal, than strictly a power to transfer. Another reason for the authority continuing after the death of the plaintiff is, that it can be done by and in the name of the agent (*b*). In *Wood* v. *Manley* (*c*) and *Wood* v. *Leadbitter* (*d*) it was held, that an authority coupled with an interest could not be revoked.

Mr. *Malins* and Mr. *Needham* for the plaintiffs, in support of the chief clerk's certificate, were proceeding to submit—first, that the right of Curtis to fill up the bill extended to the lifetime of the acceptor only, and ceased on his death; and secondly, that the claimant must be a bonâ fide holder to entitle him to be a creditor on the estate.

His HONOUR, however, stopped them, and said the impression on his mind was, that the certificate was right, and that both claims must be disallowed; but he would consider the authorities cited, and either give his decision to-morrow, or hear counsel for the respondents.

(*a*) See Story on Agency, p. 489.
(*b*) See Id., s. 459.
(*c*) 11 Ad. & E. 34.
(*d*) 13 M. & W. 853.

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*Judgment.*

*Feb. 9th.*

The VICE-CHANCELLOR now said:—

The claim of Mr. Stanway to be admitted as a creditor for 100*l.* and interest, as the holder of a bill accepted by the testator, and the similar claim of Mr. Conway, as holder of an acceptance for 50*l.*, are supported and opposed upon evidence of such facts as leave no doubt upon my mind as to the way in which their claims should be disposed of. But, in the arguments in support of their claims, some propositions stated in the reported decisions of Judges of the very highest authority have been relied upon, and used in a sense inconsistent with the established principles of the law of contract. In the case of *Russell* v. *Langstaffe* (*a*), Lord *Mansfield* laid it down as clear law that the indorsement in blank of a note is a letter of credit for an indefinite sum. Subsequent authorities have held the amount to be defined by the limits of the stamp. In the latest case quoted before me at the bar, *Montague* v. *Perkins*, the Lord Chief Justice *Jervis* stated the law in these terms: "That the giving a blank acceptance is evidence of an authority to the party to whom it is given to fill up the bill for the amount, and it may be for the term to which the stamp extends." The proposition is stated in similar terms in many other cases. But it is always so stated with reference to the rights of a bonâ fide holder for valuable consideration without notice. The general terms in which the proposition is stated must be read with reference to the facts of the cases to which it was applied. As an absolute general proposition it cannot be maintained. And, although in the passage quoted in the last case, from the judgment of Lord Chief Justice *Jervis*, it is stated in general terms and sounding as an absolute rule, yet the subsequent passages in the same judgment introduce proper qualifications, and say that giving a blank acceptance is only primâ facie evidence

(*a*) 2 Doug. 514.

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of authority to fill up, and, being only primâ facie evidence, may of course be rebutted by evidence of the real nature and extent of the authority, and of the true terms of the contract, and of the whole transaction between the person who signs in blank and the person to whom the blank acceptance is given.

Therefore the general proposition relied on in support of these motions does not absolutely govern, when the question is between the acceptor in blank and the person who receives it in blank from him, if the transaction between them is not supported by any valuable consideration. Independently of any other evidence of a contract between these two persons, the blank acceptance is an imperfect instrument, which, in itself, could create no contract, although primâ facie, but only primâ facie, it might imply some authority to one of the parties. As to a bonâ fide holder, the question as to the effect of the acceptance or indorsement having been written on a blank piece of paper can be of no importance, unless he is fastened with notice of that imperfection. If the holder has notice of the imperfection, he can be in no better situation than the person who took it in blank, as to any right against the acceptor or indorsee who gave it in blank. But, if he be a bonâ fide holder without notice, as he must have taken the negotiable instrument in a perfect shape, and in terms a complete contract, without any notice, or any circumstances of suspicion to call for inquiry, which would be equivalent to notice, the law in favour of the rights of a bonâ fide holder of the negotiable instrument, apparently perfect as a contract, will not permit the acceptor to annul the effect of his own act upon evidence of a transaction to which the holder was not privy, and which may contradict the terms of the written contract to which the bonâ fide holder was justified in giving credit.

In the case of Mr. Stanway, which I have now to dispose of, the evidence entirely excludes the application

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of the proposition much insisted upon. Mr. Stanway had full notice that the acceptance had been given in blank, and was, therefore, an imperfect instrument as between the late Mr. Searles, the acceptor, and Mr. Curtis, to whom it was given in blank. Mr. Stanway was himself present at filling up the blanks; and being thus fastened with notice of the transaction between Mr. Searles, the acceptor in blank, and Mr. Curtis, he acquired against the acceptor no better right than Mr. Curtis who gave no value for the acceptance. The transaction between Curtis and Stanway was one in which they each acted as principals; and upon that transaction the contracting parties were Curtis, Stanway, and Wallis, who, as they all had notice of the imperfection of the contract as to the acceptor, could obtain no further right against him than Curtis had.

As to the case of Mr. Conway, he is so far from being a bonâ fide holder without notice, that, instead of taking the 50*l.* acceptance in the ordinary course of business, he did not rely on the bill, but fortified his title by taking along with it a letter written by Searles, in October, 1851, as evidence of Curtis's title to the bill. Relying not on the title conferred by the bill itself as a negotiable instrument in the hands of Curtis, but requiring evidence of his title, and being deceived by the representation and defective evidence given to him by Curtis, his remedy must be against Curtis, with whom alone, upon the evidence, he can be held to have made any contract.

As to the case of both claimants being holders with notice, they are bound by the fraudulent misrepresentations on the face of both bills as to the residence of the acceptor Searles, who, having left the country to reside in Demerara, where he died, is described as living in the Old Kent-road.

These views of the infirmity of the title on both bils leave untouched the argument as to the revocation of the implied authority given to Curtis by the blank acceptance. If Curtis had given any valuable considera

tion to Searles, there would have been room for the argument, that the authority, being coupled with an interest, was not revoked by the death of Searles. But there was no such valuable consideration. The mere possession of the blank acceptances by Curtis did not give him such a beneficial interest in them as to prevent a revocation by the death of Searles.

*Judgment.*

I must, therefore, hold that neither of these claimants is a creditor of the testator Searles, and must refuse the motion with costs.

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The following notice of motion was subsequently served upon Stanway:—

"That the costs and expenses incurred by the executors of Isaac Searles, in opposing the claim made upon the estate of the said Isaac Searles by Edward Stanway, for the sum of 100*l.*, before the chief clerk, and by him disallowed; and all other costs, charges, and expenses incidental to the same; and all costs, charges, and expenses incurred or paid in consequence of the said claim being made upon the estate of the said Isaac Searles, may be taxed and paid to the executors of the said Isaac Searles."

*Feb. 22nd.*

Mr. *Malins* now appeared in support of the motion.

*Argument.*

Mr. *T. H. Terrell* opposed the motion.—It never was the practice to make the creditor pay the costs in the event of his failing to prove his debt in the Master's office. The proceedings before the Judge at Chambers were substituted for what was formerly the practice before the Master. The creditor in this case was proceeding at law until stopped by the order of this Court. It was submitted, further, that this Court had no jurisdiction to make the order, inasmuch as Mr. Stanway was not a party to the suit.

The VICE-CHANCELLOR:—

*Judgment.*

This is a very important question. There is some

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justice in the observation, that it has hitherto not been the practice to make a creditor, going into the Master's office to prove his debt, pay the costs of the attempt when unsuccessful. Under the old practice, however, the costs, generally speaking, could not be considerable, because the Master had no power to examine witnesses vivâ voce.

Recently, the legislature has thought fit to give power to the Judge's clerk, that is, to the Judge himself at Chambers, to take evidence. It is said, however, that the costs in question are not the costs of litigation; and that the creditor was prevented, by the order of this Court, from proceeding in a Court of law, which was the proper tribunal, to establish his claim. The injunction was granted, because a Court of law was not the proper tribunal, inasmuch as, when an administration suit is instituted, this Court, by its own proper jurisdiction, administers the assets in payment of debts or otherwise. Until the recent improvement in the practice, it was the duty of the Master to report on the debts; but when questions of difficulty arose, which not unfrequently happened, the Master having no means of settling the question, it was sent for adjudication before a jury, and the costs would in that case abide the result of the action at law.

To cure that infirmity, and to save expense and delay, the legislature authorised the Judges, by their clerks, to take the evidence of witnesses, in order to rebut the claims preferred at Chambers by creditors. In the present case, evidence was entered into, to contest the claim of Mr. Stanway upon the assets; expenses were incurred in Chambers in determining the question, which were greatly increased by the necessity of entering into evidence, in order to disprove the alleged debt. The creditor, upon the evidence, failed to prove his debt. Who then is to pay the costs of that inquiry? I think, if I were to allow the assets in course of administration to be diminished by the costs of resisting this unfounded claim, I should be guilty of in-

justice towards those who are entitled to the property of the testator. I shall, therefore, direct the costs of the executors incurred in resisting the claim, which the result has proved to be an unfounded claim, to be taxed and paid by the alleged creditor.

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*Judgment.*

It is said, I have no jurisdiction to make such an order, inasmuch as the creditor is not a party to the suit. I think he made himself a party by embarking in this litigation. If I have not the power to make him pay costs where he has put the estate to great expense by an improper claim, there would be a failure of justice, and if he had proved his debt he would have been entitled to costs. In my opinion I have the power and the means of enforcing the order.

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Mr. *Malins* now made a similar motion against Mr. Conway, another creditor.

*March 17th.*
*Argument.*

Mr. *F. T. White* opposed the motion, on the ground that the creditor was not a party to the suit. When the creditor went in to prove the executors ought to have required him to contribute towards the costs of the suit (*a*). Not having taken this course, they had lost their right to demand contribution: *Shirley* v. *Selby* (*b*). In this case the creditor had been compelled to go before the chief clerk, inasmuch as he had been restrained from proceeding at law.

The VICE-CHANCELLOR said, that the practice of requiring contribution had long been discontinued, and must now be regarded as obsolete. In his opinion the proceedings in Chambers must be treated as a litigation, the costs of which ought to be paid by the unsuccessful litigant, on the ordinary principle.

His HONOUR ordered that the costs of opposing the creditor's claim in Chambers should be taxed and paid by Mr. Conway.

*Order.*

(*a*) Smith's Chancery Practice, 3rd edit. 287. (*b*) 6 Madd. 447.

1854.

*Feb. 23rd.*

GALLIMORE *v.* GILL.

S. C. on. 44 L. J. N. S. Ch. 567.

A testatrix, by her will, gave her real and personal estate to executors, with a direction to convert her personal estate into money, and to pay thereout her debts, and a pecuniary legacy to A., and to hold the entire residue of her estate in trust for her grandchildren. By a codicil, she directed the trustees acting under such will to pay additional legacies. The personal estate proving insufficient for payment of the debts and legacies:—*Held*, that the legacies were a charge on the real estate.

THIS was a motion on behalf of Sarah Gill, claiming to be a legatee and annuitant under the will and codicil of Jane Gillett, that the fourth paragraph in the certificate of his Honour's chief clerk, whereby he disallowed payment of the annuity, as not being charged on the real estate, might be varied.

A similar motion was also made on behalf of the executors, as to disallowance by the chief clerk of 700*l.*, which they had paid for legacies, upon the footing that the legacies were payable out of the real estate.

The testatrix, Jane Gillett, by her will, dated the 8th of January, 1845, gave all her wearing apparel and ornaments to her niece, Sarah Gill, absolutely. She then gave and bequeathed all her furniture, &c., to her nephews Joseph Gill and George Southam, upon trust, to have an inventory made of the same, and to permit her niece Sarah Gill to use the same during her life, if she remained unmarried; and in case of her marriage, &c., upon trust to stand possessed of the same, in trust for such person as she should appoint.

The testatrix then proceeded thus:—"And I give, devise, and bequeath all my freehold, leasehold, and real property, messuages, lands, tenements, and hereditaments, and all money in my possession, and due and owing to me either from my tenants or other persons, at the time of my decease, and all other the personal estate of or to which I or any person or persons in trust for me is or are at the time of my decease, or shall or may be seised, possessed, or entitled in possession, reversion, remainder, or expectancy, or of which I have power to dispose by this my will, with their appurtenances, either under or by virtue of any power for this purpose given or reserved to me, or otherwise howsoever, (except the said furniture and effects, and any

other estate and effects which I may otherwise dispose of by this my will, or any codicil thereto), unto the said Joseph Gill and George Southam, their heirs, executors, administrators, and assigns, upon trust that they and the survivor of them, his heirs, executors, administrators, and assigns, do and shall, as soon as conveniently may be after my decease, collect and get in all money due or owing, and reduce the whole of my personal estate into ready money, and out of such money pay and discharge all my just debts, funeral and testamentary expenses, and a legacy of 10*l.* to my servant Mary Harburn, and do and shall stand possessed of the residue of such money, if any, and do and shall be seised of all the said real and leasehold property, messuages, lands, tenements, and hereditaments, upon the trusts and for the intents and purposes, and subject to the powers, provisoes, and declarations hereinafter expressed, that is to say, upon trust that my said trustees, and the survivor of them, and the heirs, executors, and administrators of such survivor, do and shall, out of the rents, issues, and profits of the said real and leasehold estate, in the first place, pay and discharge such of the said debts, funeral and testamentary expenses, as my said personalty shall be insufficient to satisfy and discharge, and, subject thereto, do and shall be seised and possessed of the entire residue of my estate or effects, in trust for my three grandchildren who shall attain twenty-one."

The testatrix then went on to provide for the application of the income, and for raising portions, &c.; and by a codicil, dated the 1st of June, 1847, she used the following language:—"I, the above-named Jane Gillett, declare this to be a codicil to the above-written will: I direct that the trustees or trustee acting under such will shall pay to my servant Mary Harburn 40*l.*, in addition to the legacy of 10*l.* above mentioned; and also, during the life of my niece Sarah Gill, in addition to the bequests abovementioned, shall pay to her an annuity of 100*l.*, on the 25th of March, 24th

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*Statement.*

of June, 29th of September, 25th of December, in every year," &c.

The testatrix died on the 8th of July, 1847, and a suit was shortly afterwards instituted in this Court for the administration of her estate. On the 3rd of June, 1853, the usual accounts and inquiries were directed. On the 6th of February, 1854, the chief clerk certified that the trustees and executors had paid the legacies and annuities; but, inasmuch as they were not charged on the real estate, the personal estate being insufficient to pay the debts, he had disallowed such payments.

The present motion was by way of appeal from that decision.

*Argument.*

Mr. *Wigram* and Mr. *Little* for the motion.—The testatrix directs her trustees to pay the legacies out of the property given by the will, viz. her real and personal estate, which she has blended together; she has, therefore, made the whole assets in their hands for this purpose. In *Awbrey* v. *Middleton*(*a*), Lord *Cowper* held, that real estate devised to an executor was chargeable with debts and legacies. In *Henvell* v. *Whitaker*(*b*), where the real and personal estate were blended together, and bequeathed and devised to the executors, it was held, that the debts were charged on the real as well as on the personal estate. In *Cross* v *Kennington*(*c*) a testator gave certain legacies, and charged his executors, to whom he devised and bequeathed his real and personal estate, with the payment thereof; and it was held, that the legacies were charged on the real estate. In *Bench* v. *Biles*(*d*), the testator gave his real and personal estate to his wife for life; and, after her decease, gave several legacies, and gave and devised the rest, residue, and remainder thereof

(*a*) Cases in Equity Abridged, Vol. 2, ch. 50, p. 498; also Vin. Abr. title "Charge, D." case 15, edit. of 1791, Vol. 4, p. 460.

(*b*) 3 Russ. 343.

(*c*) 9 Beav. 150.

(*d*) 4 Madd. 187.

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to his nephews; and it was held, that the legacies were charged on the real estate. The same doctrine was laid down in the cases of *Cole* v. *Turner* (*a*) and *Mirehouse* v. *Scaife* (*b*).—Jarman on Wills was also cited, Vol. 2, pp. 532 et seq., where the cases are collected. See also *Hassell* v. *Hassell* (*c*), *Brudenel* v. *Boughton* (*d*).

*Argument.*

Mr. *Malins* appeared for the executors, who had been disallowed by the chief clerk the payments made to the legatees.

Mr. *Bacon* and Mr. *Faber* for the testatrix's grandchildren.—In the cases cited, the devise has been on condition of paying the legacies. The Court could not indulge conjectures as to the intention of the testatrix, but must be governed by her expressions. The Court could not infer that the legacies were to be charged on the real estate because she demised her real estate to her executors: *Parker* v. *Fearnly* (*e*).

Mr. *Walker* and Mr. *C. Hall* on the same side.—The will and codicil make up one instrument, so that the codicil must be read as a part of the will. But, by the will, the testatrix directed the pecuniary legacy given by it to be paid out of her personal estate. In her codicil, she has not specified the property out of which it is to come; but the Court cannot hold that the pecuniary legacy given in the will is payable out of personalty, and those given by the codicil out of the real estate.—They cited *Crowder* v. *Close* (*f*) and *Leacroft* v. *Maynard* (*g*).

The VICE-CHANCELLOR:—

*Judgment.*

If I were to hold that these legacies are not a charge upon the real estate, I should defeat, as it seems to me, the intention of the testatrix, and put an irrational construction on the will.

(*a*) 4 Russ. 376.
(*b*) 2 My. & Cr. 695.
(*c*) 2 Dick. 527.
(*d*) 2 Atk. 268—272.
(*e*) 2 S. & S. 592.
(*f*) 2 Ves. jun. 449.
(*g*) 1 Ves. jun. 279.

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*Judgment.*

The testatrix, by her will, gave one small pecuniary legacy to her maid servant, and, being anxious that it should be paid immediately, she directed her personal estate should be converted into money, and out of such money her debts should be paid, and also the legacy to her maid-servant. The oftener I have read the language of the will, the stronger has been my conviction that the special direction that this legacy should be paid out of the proceeds of her personal estate, was given by the testatrix in order that the payment of it might be immediate. Having made this gift, the testatrix goes on to give to her trustees the whole of her real and personal estate in trust for her grandchildren.

By the codicil, the testatrix directs *the trustees acting under her will*, that is, the same persons who were acting in the general administration of her real and personal estate, to pay, in addition to the legacy of 10*l.* given to the maid-servant, a further sum of 40*l.*, and an annuity of 100*l.* to her niece.

It has been contended, that the testatrix, having directed the one legacy to be paid out of the personal estate, the Court cannot hold that the other pecuniary legacy—to the same object—was intended to be charged on a different species of property But the language of the codicil is general, and I do not feel myself at liberty to narrow the meaning of the general words "acting under my will," by interpreting them to mean not acting in the general administration of the property of the testatrix, but acting only in administering her personal estate.

I am glad not to be forced to put such a construction on a will, the language of which, as Lord *Cowper* says in *Awbrey* v. *Middleton*, ought rather to be enlarged than narrowed. I shall make a declaration that the legacies are charged on the real estate, and direct the chief clerk to review his certificate.

1854.

## WARBUTTON *v.* WARBUTTON.

*Feb. 25th.*

JAMES WARBUTTON, by his will, made the following disposition of his real and personal estate:—"I give, devise, and bequeath all my real, leasehold, copyhold, and personal estate, of whatever description and wherever situate, unto my two nephews, George Cubbin and William Warbutton, upon trust, to sell and dispose of all my leasehold and personal estate, to invest the money arising therefrom upon Government or real security, and to receive the rents, issues, and profits of the real estate, and by, with, and out of the proceeds arising therefrom to pay to my wife Betty Warbutton the annuity or yearly sum of 20*l.* for and during her natural life; and also on trust to pay to Mary Ann Lancaster, widow, the sum of 100*l.*, within twelve months after my decease, and also an annuity of 20*l.* for her life." The testator then gave other legacies; and then empowered his trustees to lease his real and leasehold estate in the following terms:—

"And I hereby empower my said trustees and trustee to demise, lease, set, let, and manage my said real estates, as also my leasehold estate, so as to produce the greatest rental."

The testator died on the 15th of May, 1850, leaving his widow him surviving.

The testator's real and personal estate was of the annual value of 112*l.*

The taking of the accounts having been referred to Chambers, his Honour's chief clerk had allowed the claim of the widow to dower, and also to the annuity given by the will.

This was a motion to vary the certificate of the chief clerk.

A power to lease and manage his real estate, given by a testator to his trustees, does not, by itself, raise an implication of the testator's intention to exclude his wife from dower, so as to compel her to elect.

In determining the obligation of the widow to elect, the Court will regard the intention of the testator, apparent on the whole of the will.

The amount of the provision made by the will is a material circumstance in indicating the testator's intention.

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WARBUTTON v. WARBUTTON.

*Argument.*

Mr. *Bacon* and Mr. *Little* for the next of kin.—The widow is bound to elect, whether she will take the provision made for her by the will or her dower. In *Roadley* v. *Dixon* (*a*), Lord *Lyndhurst* held, that a direction by the testator to his trustees to occupy and manage a portion of the estate was inconsistent with the right of the widow to have any part of the land subject to such power assigned for her dower, and set out by metes and bounds, and that the widow was bound to elect. In *Hall* v. *Hill* (*b*), Lord *St. Leonard's* held, that a power to the trustees to lease the testator's lands was sufficient to put the widow to her election. The learned Judge had maintained the same view in the case of *O'Hara* v. *Chaine* (*c*), which he determined subsequently. In *Lowes* v. *Lowes* (*d*), Sir *James Wigram* had expressly held, that the power of leasing and management would put the widow to her election, and repudiated any distinction between general and discretionary and more specific powers of management. In the case of *Grayson* v. *Deakin* (*e*), which was undistinguishable from this, Vice-Chancellor *Knight Bruce* decided that a leasing power to the trustees put the widow to her election; and in *Parker* v. *Sowerby* (*f*), Vice-Chancellor *Kindersley* came to the same conclusion, on the ground that it had been decided by a long series of cases, that a devise on trust to manage or lease, indicates an intention so to dispose of the estate that the widow's enjoyment of dower is inconsistent with it.

Mr. *T. Stevens*, for the heir-at-law, cited the case of *Chalmers* v. *Storill* (*g*).

Mr. *Elmsley* and Mr. *Sandys* appeared for parties in the same interest.

(*a*) 3 Russ. 192.
(*b*) 1 Dru. & War. 102.
(*c*) 1 J. & L. 662.
(*d*) 5 Hare, 501.
(*e*) 3 De G. & S. 298.
(*f*) 1 Drew. 492.
(*g*) 2 V. & B. 222.

Mr. *Shapter*, for the widow.—There is some conflict in the decisions; but the true principle that must guide the Court is the intention of the testator. It has been decided, that a power to sell is not inconsistent with the widow's right to dower. In *French* v. *Davis* (*a*) it was laid down, that a widow cannot be put to her election to take under the will of her husband or her dower, except by express declaration, or necessary inference from the inconsistency of her claim with the disposition of the will. How was a power to lease more inconsistent with the widow's dower than a power to sell, which it had been decided was not inconsistent at all. The cases cited proceeded on the intention of the testator to exclude the wife from her claim. In *Roadly* v. *Dixon* (*b*), there was a manifest intention to exclude the widow from dower as to one part of the land, from which the learned Judge deduced a general intention; and the same circumstance assisted in the case of *O'Hara* v. *Chaine* (*c*). In *Hall* v. *Hill* (*d*), there was an ample provision by the will, and a gift of a portion of the land, as in the other cases. In *Lowes* v. *Lowes* (*e*), the testator's whole income was only 170*l.* per annum, of which he gave an annuity of 100*l.* to his widow, and directed his trustees during the trusts to manage and carry on his farm, to restrict it or increase it, and to demise, mortgage, or sell any part of it. Under these special circumstances the widow was held bound to elect.

The following cases were also cited:—*The Attorney-General* v. *Earl of Lonsdale* (*f*), *Gibson* v. *Gibson* (*g*); and see *Holditch* v. *Holditch* (*h*), *Dowson* v. *Bell* (*i*).

Mr. *Little* in reply.—A power to lease the land to the

(*a*) 2 Ves. 572.
(*b*) 3 Russ. 192.
(*c*) 1 J. & L. 662.
(*d*) 1 Dru. & W. 102.
(*e*) 5 Hare, 501.
(*f*) 1 Sim. 105.
(*g*) 1 Drew. 42.
(*h*) 2 Y. & C. 18.
(*i*) 1 Keen, 761.

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*Argument.*

best advantage is clearly inconsistent with the wife's dower, which was an estate to be set out by metes and bounds. But the question was settled by authority, because it was impossible to distinguish this case from that of *Grayson* v. *Deakin*, decided by Vice-Chancellor *Knight Bruce*.

*Judgment.*

The VICE-CHANCELLOR:—

I am bound to decide this question upon the authorities, which, in my opinion, have settled the law upon the subject.

A widow, dowable out of the lands of her husband, for whom a provision is made by his will, without any allegation that such provision is given in lieu of her dower, is entitled both to her dower and to the provision made, unless upon the whole will there is something to raise a necessary implication that the gift is in substitution of dower. This I understand to be the principle to be deduced from the authorities that have been cited.

In the application of that principle there is often considerable difficulty, which arises in a great measure from a different view in the minds of particular Judges as to what constitutes a necessary implication on the face of the will.

It is said, that, if in this case I hold that on this will there is not enough to raise a necessary implication that this annuity was in substitution for dower, I shall unsettle the law and overrule the authorities; but I intend to do neither, and I will endeavour to state why I feel it impossible to come to the conclusion that the widow must elect.

The cases that have been pressed upon my attention are those of *Hall* v. *Hill*, *Grayson* v. *Deakin*, and *Parker* v. *Sowerby*. The decision in the last two cases goes far to support the proposition that the widow must be put to her election.

In my opinion, these last decisions have proceeded upon

a misapprehension of the grounds of the decision in the case of *Hall* v. *Hill*. In that case, Lord *St. Leonard's* decided no such proposition as that he is assumed to have decided by the learned Judges who professed to follow his authority. The proposition is reduced to this, whether, if a widow be entitled to dower, and her husband by his will has made her a provision, and given a leasing power to trustees over the whole of his lands, the mere gift of such a power to the trustees is enough to raise a necessary implication that the provision by his will was intended by her husband to be made in substitution of her dower. Lord *St. Leonard's* carefully abstained from laying down any such proposition, which, moreover, in the case of *Hall* v. *Hill*, he was not required to consider or decide. In that case, Lord *St. Leonard's* had to deal with other circumstances besides the leasing power conferred upon the trustees. The testator had made an ample provision for his widow; he had given to her one portion of the estate for her life, and an annuity charged on his general estate, with a power of distress and entry. In addition to these circumstances, there was vested in the trustees a power of leasing to be exercised over the whole of the testator's estates. Lord *St. Leonard's*, in his judgment, notices those features in the cases; and with respect to the leasing powers, observes, he could not very well see how it could be exercised over the whole of the testator's estates if the right of the widow to dower was to be maintained. The power of leasing in that case was given with a special object, and if the widow had been allowed to retain both her dower and the provision made for her by the will, it would have deranged the whole scope of the will.

As I understand the case of *Hall* v. *Hill*, the judgment proceeded mainly on the circumstance that the widow acquired under the will a much larger provision than the value of her dower, and that was held to raise an implication that the testator did not intend that his widow

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*Judgment.*

should have both. But that case is far from being a decision that the mere circumstance of a testator giving a leasing power to his trustees is enough to raise an implication of his intention to exclude his widow from her dower.

In my opinion, therefore, any case which is founded upon the assumption that Lord *St. Leonard's* judgment in *Hall* v. *Hill* proceeded mainly, if not entirely, upon the existence of the leasing power, is not to be followed as an authority.

The principle on which the Court must act is perfectly clear. I must look at the whole of the will, to ascertain, if possible, whether it was the intention of the testator to give to his widow the annuity in addition to her dower, or in substitution of it. I am satisfied in this case that the testator had no intention of excluding his widow from dower, because the whole provision made for her was an annuity of 20*l.*; and it appears that for a stranger he made a provision of the same amount. So far, therefore, from there being in this case the governing feature that existed in the case of *Hall* v. *Hill*, viz. provision for the widow, ample, as compared with the value of the assets, it is clear that the widow would, if put to her election, elect to take her dower. In *Hall* v. *Hill*, the amplitude of the provision left no doubt that the widow, if compelled to elect, would forego her dower, whereas here the reverse would be the case.

The gift of the leasing power is a strong circumstance, and might be conferred in such a way as to shew a clear intention on the part of the testator to exclude his wife from dower. There is nothing in this case that can raise any such implication, or can rebut the right to dower which is given by law to the wife. I must hold, therefore, that she is entitled to her dower, as well as to the provision made by the will.

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IN THE MATTER OF POOL BATHURST'S ESTATE, AND THE SOUTH WALES RAILWAY COMPANY. *Feb. 27th.*

Where three trustees were named in a settlement with a power to the cestui que trusts, to nominate, substitute, or appoint any person or persons in the place of the said present or other trustee or trustees, who should die," &c.:— *Held*, that an appointment of two persons only in the room of the three original trustees, was a valid appointment.

A QUESTION was raised on this petition, whether a deed appointing new trustees, dated the 10th of July, was a valid exercise of a power.

By an indenture of settlement, dated the 30th of December, 1777, between Henry Fane of the first part; Edward Buckley Batson and Ann Batson of the second part; and J. Batson, S. Batson, and David R. Michel of the third part, reciting, that a marriage had been agreed upon and shortly intended to be solemnised between the said Henry Fane and Ann Batson, it was agreed that the said J. Batson, S. Batson, and D. R. Michel should stand possessed of certain monies out on mortgage, assigned by Mr. Henry Fane upon the trusts therein declared.

By a deed-poll, under the hand and seal of the said Henry Fane, reciting, that the said money, amounting to 7000*l.*, was then due, with interest, it was witnessed, that, in consideration of 7000*l* expressed to be paid to the said Henry Fane by the said J. Batson, S. Batson, and D. R. Michel, their executors, administrators, and assigns, all those the said manors, &c. &c. which were demised by the said Bathurst to the Earl of Westmorland for 500 years, and which had become vested in the said Henry Fane for the residue of the said term, and the sum of 7000*l.* due and owing to the said Henry Fane, with powers for recovering the same; to hold the same, and also the said sum of 7000*l.* to the said J. Batson, S. Batson, and D. R. Michel, for the residue of the said term, subject to redemption, &c.

The deed contained the following power for the appointment of new trustees:—

"In case the said J. Batson, S. Batson, and D. R. Michel,

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*Statement.*

or any of them, die, or be desirous to be discharged of and from the trusts thereby in them reposed as aforesaid, before the same trusts shall be fully performed and executed, or shall neglect or refuse to act in the said trusts, then and in any such case, and when and so soon and as often as the same shall happen, it shall be lawful to and for the said Henry Fane and Ann Batson, and the survivor of them, by any writing or writings, to be sealed and delivered by them or the survivor of them in the presence of and attested by two or more credible witnesses, to nominate, substitute, or appoint any other person or persons to be a trustee or trustees for the several purposes aforesaid, or any of them, in the place or stead of the said present or any succeeding or other trustee or trustees who shall so die or be desirous to be discharged of and from or shall neglect or refuse to act in the said trusts as aforesaid, and so, from time to time and so often as there shall be occasion, to nominate, substitute, and appoint any other person or persons to be a trustee or trustees for the purposes aforesaid, or any of them, in the place and stead of the said persons, or any succeeding or other trustee or trustees who shall so die, or be desirous to quit and be discharged of and from or neglect or refuse to act in the said trusts."

The marriage was solemnised on the 13th of January, 1773. Henry Fane, the husband, died in 1802.

By a deed-poll, dated the 10th of July, 1811, under the hand and seal of the said Ann Fane, late Ann Batson, indorsed on the settlement, reciting, as the fact was, that the said J. Batson and D. R. Michel had departed this life, and that the said S. Batson was desirous of relinquishing the said trusts, and that the said Ann Fane was desirous of appointing her son Major-General Henry Fane and Charles W. Michel to be joint trustees of the said indenture in lieu of the said James Batson, S. Batson, and D. R. Michel; and reciting, that the said Henry Fane and Charles W. Michel had agreed to take on themselves the

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said trusteeship, it was by the said deed-poll witnessed, that the said Ann Fane, by virtue and in exercise and execution of the power and authority given to her for that purpose by the said indenture, and of all other powers and authorities enabling her in that behalf, did, by that writing, under her hand and seal, attested by two credible persons, whose names were underwritten as witnesses to the reading and delivery thereof, nominate, substitute, and appoint the said Henry Fane and C. W. Michel to be trustees in stead of the said J. Batson, S. Batson, and D. R. Michel, of the several trust-moneys and premises which were assigned to and vested in them by the said indenture of settlement for the several purposes, and with all the powers and authorities expressed in and granted by the said indenture of settlement.

J. Batson died in October, 1812, having appointed his sons his executors, who duly proved his will.

Charles W. Michel died on the 27th of May, 1827. Major-General Fane died on the 7th of February, 1828, having appointed his brother V. Fane and R. G. C. Fane his executors, but made no disposition of the trust estate.

A part of the lands in mortgage being required by the South Wales Railway Company for the purposes of their railway, an agreement was entered into between them and the tenant for life, Mr. Bathurst, for the purchase of the land required for a sum of 16,387*l.*, which was immediately afterwards paid by the company into Court and invested in Consols. A petition was presented on the 22nd of July, 1851, by Mr. Bathurst, praying that so much of the said fund as should be necessary might be applied in paying off the said incumbrances; on the hearing of which, the Vice-Chancellor *Knight Bruce,* on the 26th of July, referred it to the Master to ascertain the incumbrances and the amount due for principal and interest. The order had not been drawn up, but it had been since ascertained that the amount of the incumbrances was 15,840*l.*, of which 840*l.* was due to the petitioner.

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*Argument.*

This petition was now presented, praying that the said incumbrances might be paid off out of the funds paid into Court by the company.

Mr. *Malins* and Mr. *F. T. White* contended, that the appointment, in 1811, was valid. The trust was permissive, and there was no obligation on the donees of the power to appoint three trustees to discharge the trust. In *Miller* v. *Priddon* (*a*), the Vice-Chancellor held, that the appointment of one trustee by the survivor of two trustees was a valid exercise of the power; and this decision was affirmed on appeal (*b*). In the case of *Fagg's Trust* (*c*), by the indenture three trustees were appointed, with the ordinary power to re-appoint in case of death or any of the trustees being desirous to be discharged. One of the trustees died, and the two surviving trustees being desirous to be discharged, two new trustees were appointed; and the Court held the appointment valid, and made the old trustees who refused to recognise it pay the costs occasioned by their paying the money into Court. The same principle was adopted in the case of *Corrie* v. *Byron* (*d*) by Vice-Chancellor *Wigram*.

Mr. *Fane* appeared for the executors of the subsequently appointed trustees.

Mr. *Osborn* for the South Wales Railway Company.—The case of *Corrie* v. *Byrom* was a decision in a friendly suit without argument, and is therefore of little value as an authority, and so Mr. Hill regards it. It was, moreover, inconsistent with the dictum in *Meinertzhagen* v. *Davis* (*e*), in which Vice-Chancellor *Knight Bruce* lays down the rule, that there ought to be an adherence to the

(*a*) 18 L. J., Chanc., 226.
(*b*) 1 De G., Mac., & G. 335.
(*c*) 19 L. J., Chanc., 175.
(*d*) Hill's Trustees, App., p. 610.
(*e*) 1 Coll. C. C. 345.

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original number of trustees where new trustees are appointed. In the case of *Ex parte Davies*(*a*) the appointment of more than the original number of trustees was held to be invalid. In *Hulme* v. *Hulme*(*b*) the appointment of one trustee instead of two, which was the number in the original deed, was held to be a breach of trust, for which the former trustees were liable.

The VICE-CHANCELLOR:—

*Judgment.*

In cases of this kind the Court ought to be governed by the plain and sensible meaning of the language in which the power to appoint trustees is given. In the language of this instrument, I can see nothing inconsistent with the appointment of two trustees in lieu of three. It is objected, that the appointment of two trustees instead of three, which was made nearly forty-three years ago, was not a valid exercise of the power. Considering that the trusts have been administered ever since on the footing that the appointment was valid, I should feel considerable reluctance in disturbing it; because, if I were to hold that the appointment was invalid, everything that has been done in the trust during that period would be liable to be impeached. Fortunately, I do not find myself bound to arrive at any such conclusion. I think that the appointment of two trustees instead of three was not inconsistent with the language of the power, and that the representatives of the survivor of the two trustees so appointed are capable of giving a good discharge.

With respect to the authorities that have been cited it must be borne in mind, that, on questions of this kind, the Court must be a good deal governed by the selection of the cestui que trusts, the state of the property, and the time at which the appointment is brought to the notice of the Court. The case of *Fagg's Trust,* and the

(*a*) 2 Y. & C. 468. (*b*) 2 My. & K. 682.

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other cases decided by the Vice-Chancellor of *England* and Vice-Chancellor *Knight Bruce*, were decided on the circumstances under which those cases were brought to the notice of the Court. Cases frequently occur, in which it is necessary that the full number of trustees should be kept up; and other cases, on the contrary, where such a course would be attended with inconvenience to the interests of the cestui que trust. In this case I think the appointment was a valid exercise of the power, and that the representatives of the surviving trustee can give a good discharge; and I shall make a declaration accordingly.

*Feb. 28th.*

## YATES *v.* PLUMBE.

A mortgagee being decreed to reconvey one undivided moiety of an estate included in his security (a part of the debt being satisfied,) to the mortgagor, and being entitled to retain the title deeds of the whole estate, is bound to covenant to produce the deeds.

UNDER a decree of the Court, dated 8th of December, 1845, the defendants, who were mortgagees in possession of an estate called Prescotts, were ordered to convey to the plaintiffs one undivided moiety of the said estate, the conveyance to be settled at Chambers in case the parties differed.

The property formed a part of a larger estate held under the same title-deeds, to which the defendants were entitled in fee. A question having arisen between the parties as to whether the plaintiffs were entitled to a covenant for the production of the deeds, or entitled only to attested copies, his Honour at Chambers directed the opinion of the Conveyancing Counsel to be taken; upon which the matter was referred to Mr. Hayes, whose opinion is given below.

Mr. *Follett*, on a subsequent occasion, submitted to the Court that the plaintiffs were entitled only to have at-

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tested copies. He cited the case of *Trodd* v. *Downes* (*a*). This was not the ordinary case where the vendor entered into a contract, which he would of course be bound to perform.

*Argument.*

Mr. *Taylor* appeared contrà.

*Judgment.*

The VICE-CHANCELLOR thought that the plaintiff was entitled to a covenant to produce the deeds.

The following is the opinion referred to:—

"As I understand the facts, the muniments relate as well to the undivided moiety now to be conveyed as to other lands of which the defendants are owners in fee, and that such muniments are retained by the defendants as such owners. I think a covenant on their part to produce these muniments was properly introduced into the draft conveyance. In a similar case, Lord *St. Leonard's*, when at the bar, advised, that a part owner claiming the covenant should tender to the holder of the deeds a covenant in the usual form, and, on his refusal to execute, file a bill to have the deeds deposited for the use of both parties; but the covenant was conceded. These covenants are not of much value, unless a memorandum, to carry notice, be indorsed on the deeds, or on some material deeds or deed; but however important this may be, it can hardly be said to be the established practice.

"WILLIAM HAYES.

"Lincoln's Inn, 22nd February, 1854."

(*a*) Seton on Decrees, p. 188.

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*Jan. 25th & 26th.*

## SANDFORD *v.* JODRELL.

One of three trustees, who was alleged to have participated in a breach of trust, clearly committed by the others, being also executor of a cestui que trust :— *Held* that a legatee of the cestui que trust was entitled to maintain a bill against the three trustees to recover the funds lost by the breach of trust.

THE plaintiff Mr. Sandford, who was one of the legatees under the will and codicils of the Rev. John Holland, filed the bill in this cause on behalf of himself and the other legatees, to recover, as part of the assets, a large sum of money to which the testator was entitled under the ultimate trust in his marriage settlement.

The defendants were the three trustees of the marriage settlement, one of them being also the executor under the testator's will. The other defendants were the other legatees under the testator's will.

The testator, by his will, dated the 18th of September, 1843, after giving certain legacies, which were duly paid on the testator's decease, gave certain legacies, payable twelve months after his wife's decease; and, as to all the residue of his monies and effects, he gave the same to his wife; and he appointed her and Mr. Holland and Mr. Edward Jodrell executors of his will; and he requested his executors to appropriate and set apart and invest on government or real security a sufficient sum of money out of his residuary personal estate to answer the several legacies which were made payable at the decease of his wife, and to pay to his wife, or permit her to have and receive, the annual proceeds of the sum so to be appropriated during her life. The will contained the usual direction, that his executors should be answerable for their own acts, receipts, and defaults only, and that they should not be responsible for each other, nor for any involuntary losses by the failure of securities, bankers, or otherwise in the execution of the trusts of his will.

The plaintiff became entitled, under one of the codicils to the testator's will, to the one-sixth share in a legacy of 800*l.*

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*Statement.*

The testator died in 1844, when the will and two codicils were proved by Mr. Edward Jodrell alone.

By an indenture of settlement, dated the 18th of May, 1814, made on the marriage of the testator, Mr. Holland, with Mrs. Holland, then Miss Catherine Mary Lowndes, a policy of assurance, whereby a sum of 2000*l.* was assured in the Equitable Assurance Office, to be paid on the death of Mr. Holland, was assigned to, and became vested in, certain trustees, of whom Mr. Edward Jodrell, Sir Richard Paul Jodrell, and Mr. William Francis Lowndes Stone were the survivors, upon trust, after the decease of Mr. Holland, to receive the moneys payable upon the policy, and to stand possessed thereof, upon trust, to invest the same in their or his names or name in parliamentary securities, or at interest upon real security in England, and to vary the same, and to stand possessed of such securities, upon trust, in case Mrs. Holland should survive Mr. Holland, to pay the annual proceeds thereof to her for her life; and, after her decease, in case there should not be any issue of the marriage who should attain a vested interest (which event happened), the trust moneys were to be upon trust for the executors, administrators, or assigns of Mr. Holland.

Messrs. Gatty & Turner were the attorneys of the testator up to the time of his death; they were afterwards the attorneys of Mrs. Holland, and they also were the attorneys of the executor Mr. Edward Jodrell, as such, and of Messrs. Edward Jodrell, Sir Richard Paul Jodrell, and Mr. William Francis Lowndes Stone, as the trustees of the settlement; and they appear to have had the entire confidence of all these persons.

In the month of March, 1845, the trustees gave a power of attorney to Messrs. Gatty & Turner, empowering them to receive the moneys which had become payable upon the policy upon the death of Mr. Holland; and they invested the amount which they received in the purchase, in the names of the trustees, of the sum of 4810*l.*, 3*l.* per Cent.

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Consols. Messrs. Gatty & Turner, being authorised by a power of attorney, &c., received the dividends on the sum invested, and duly accounted for them to Mrs. Holland. In the month of June, 1846, the trustees gave Messrs. Gatty & Turner a power of attorney, authorising them to sell out the sum of 4810*l.*, 3*l.* per Cent. Consols. The sale realised the sum of 4604*l.* 7*s.* 6*d.*

A mansion called Lawstock Hall and other hereditaments were then vested in Messrs. Garth and Gatty in fee, subject to a prior mortgage upon the same hereditaments for 10,000*l.*, by way of second mortgage for securing the sum of 5000*l.* The names of Messrs. Garth and Edward Gatty had been used in trust for Mr. William Gatty. This security was paid off by Messrs. Gatty & Turner by means of the 4604*l.* 7*s.* 6*d.* trust fund, and of the sum of 395*l.* 12*s.* 6*d.* which was advanced by Mrs. Holland for the purpose of making up the principal sum of 5000*l.*; but the security was continued in the names of Messrs. Garth and Gatty.

Mrs. Holland's income from the 5000*l.* was paid by Mr. Edward Jodrell to her until her death, which happened on the 16th of February, 1848.

The property charged with the 5000*l.* was barely sufficient to realise the first mortgage of 10,000*l.* secured thereon, and the 5000*l.* was entirely lost. The trust fund having been thus lost, the three trustees proceeded against Messrs. Gatty & Turner by suit in equity to charge them with the amount; but that suit was ineffectual.

Under these circumstances, Mr. Sandford the plaintiff, on behalf of himself and all other the unsatisfied legatees under the will and codicils of Mr. Holland, filed this bill against Mr. Edward Jodrell, Sir Richard Paul Jodrell, and Mr. William Francis Lowndes Stone, the three trustees of the settlement; and, after stating the above circumstances, prayed for an account of what was due to the plaintiff and to all other the unsatisfied legatees in respect of their lega-

cies; and if the defendants should admit that they had in their hands sufficient money to pay the same, then that the defendants should be decreed to pay the same accordingly; but if the defendants should not admit that they had in their hands sufficient for such purposes, then that an account might be taken of the moneys received by the trustees of the settlement in respect of the policy, and of their application thereof at the death of the testator's wife; and that the defendants might be decreed to answer and make good to the testator's estate the amount thereof, with interest.

The defendant, Mr. Edward Jodrell, the executor of the testator, and also one of the trustees of the settlement, had become of unsound mind, (though not found so by inquisition,) and he answered by his guardian.

Sir Richard Paul Jodrell and Mr. Stone submitted, by their answers, that the trusts of the indenture of settlement had virtually terminated on the death of Mr. Holland; that Mr. Edward Jodrell, as the executor of Mr. Holland, with the concurrence of Mrs. Holland as tenant for life, was competent to receive the moneys payable on the policy, and that, in fact, he had taken on himself to receive and invest the money; and that this defence was strengthened by the fact, that Mrs. Holland had advanced out of her own moneys an amount sufficient to make up the sum of 5000*l*. They also stated, that Mrs. Holland had appointed Mr. Edward Jodrell her sole executor, who proved her will in 1848; and they submitted, that any concurrence by them in proceeding to realise the security and in suing Messrs. Gatty & Turner, was merely because, finding their names had been mixed up in the security without their knowledge, they were advised that they might aid in its recovery; and they submitted, that they had been improperly made parties to the suit, and that the plaintiff was not entitled to any relief as against them; and even if they were liable in respect of the policy com-

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*Statement.*

prised in the indenture of settlement, they were liable to account for the same only at the suit of Mr. Edward Jodrell as the executor of Mr. Holland. Some other of the circumstances on which these defendants relied appear in the argument of their counsel.

Mr. *Craig* and Mr. *Nichols* for the plaintiff.

Mr. *Bacon* and Mr. *Goldsmid* for the defendant Edward Jodrell.

Mr. *Malins* and Mr. *Hardy* for the defendant Sir Richard Paul Jodrell; and

Mr. *Follett* and Mr. *Phillips* for the defendant Mr. Stone.

If Mr. Edward Jodrell, who, as the executor of the cestui que trust, and alone had a right to complain, had instituted this suit against his co-trustees for contribution, he must have failed. The things complained of were done at his suggestion and on his advice; he, in fact, as executor, took, as he had a right to do, the management of the trust funds out of the hands of his co-trustees, and assumed the absolute control. He dealt with the trust funds as executor, and never alleged that he was acting as trustee until May, 1849, when the loss complained of had arisen. The suit, against the solicitors, of *Jodrell* v. *Turner* was instituted at the instigation of Mr. Edward Jodrell, for his own protection, and with a view to involve his co-trustees in an admission of their liability; that suit has substantially failed.

The present suit is instituted against the co-trustees of Mr. Edward Jodrell, at his suggestion, and for his indemnity, with a view to obtain, by circuity, that relief which he could not have obtained in a suit instituted by himself against them.

The question arises—can such a suit as the present, a suit of legatees against their testator's executor jointly with others, who together may be debtors to that estate, prevail?

The only recognised grounds for the frame of such a bill are—

1. Collusion between the executors and the debtors, which is not charged here.

2. Insolvency of the executor, which is not suggested.

3. Refusal of the executor to sue, which is not established; or,

4. Some incapacity to sue the executor. But this ground does not arise; because, if the trustees, as such, are liable, then Mr. Edward Jodrell, as being one of them, is liable for the whole demand, and might have been made answerable for the whole amount in a suit against him alone as executor.

As executor, Mr. Edward Jodrell's duty was to get in the trust fund; and he might be dealt with as being liable for a devastavit in not having got it in.

The facts of the case shew that Mr. Edward Jodrell, as executor, had obtained virtual possession of the fund, and that, as executor, he might have been sued for it alone; the loss must be regarded as one sustained through his misconduct whilst acting as executor. Even if he should have been sued as one of the trustees as well as executor, that would have met the exigencies of the case without a further violation of the rule of pleading, by making parties, who were simply debtors to the testator's estate co-defendants with the executor in a suit for the administration of his estate, which this suit is in reality.

On the merits—the case is not sustainable against Sir Richard Paul Jodrell and Mr. Stone. The position of the trust funds and parties, and their rights on the death of Mr. Holland, were, that his executors, Mr. Edward Jodrell and Mrs. Holland, who was entitled to the income

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*Argument.*

for her life under the settlement and will, were together competent to demand and receive the entire fund from the trustees of the settlement.

Messrs. Gatty & Turner were, on Mr. Holland's death, retained by Mr. Edward Jodrell as executor, and by Mrs. Holland, she acting through him as her agent, as their solicitors. Everything now complained of was done by Messrs. Gatty & Turner, as solicitors for them alone; the solicitors were not, for these purposes, retained or employed by Sir Richard Jodrell or by Mr. Stone.

The money received under the policy was, in fact, received for Mr. Edward Jodrell, with the approbation of Mrs. Holland, and it was invested in Consols under the direction of Mr. Edward Jodrell, as executor and as agent for Mrs. Holland. The investment was made in the names of the three trustees, without their knowledge until long afterwards.

The investment might just as well have been made in the names of any other persons—their powers and liabilities as trustees over the fund had ceased when they executed the power of attorney to receive the amount payable on the policy, whereby they parted with the fund upon authority competent to authorise them in doing so.

The re-investment in Consols in their names did not re-constitute them trustees under the settlement; and, from thenceforth, if they were trustees at all, it was for Mr. Edward Jodrell merely, and they became bound to deal with it according to his directions as executor.

But, assuming that the trustees were not discharged upon the execution of the power of attorney authorising the receipt of the money due on the policy, they, at all events, became so upon the execution of the power of attorney for the sale of the stock. From the transactions, it appears to have been intended to withdraw the funds for every purpose from the control of the trustees, and to deal with them as assets in the hands of Mr. Edward

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Jodrell under the will, with Mrs. Holland's consent. The mixture and consolidation of her private moneys with the insurance moneys can only be accounted for on the assumption, that they were considered as the general assets of Mrs. Holland, subject only to the legacies given by the will of Mr. Holland, the testator.

Neither Mr. Edward Jodrell nor the plaintiff, whom he, as executor, represented, and for whom he was acting, can be allowed to repudiate all that he, as executor, has done; and he and the plaintiff are bound by what took place before the loss was known. But, assuming the liability of the trustees, the security taken was a proper one at the time. It is not an improper security merely because it was a second mortgage: *Norris* v. *Wright*(*a*). No loss was sustained from the circumstance that the mortgage was not taken in the names of the trustees, nor from any defect of title; but it arose solely from the supposed deficiency of value, which is inferred from the sale effected in depressed times; but trustees are not liable for that.

These two defendants are entitled to inquiries as between them and Mr. Edward Jodrell, and then to ascertain whether the loss ought not wholly to fall on Mr. Edward Jodrell, or in what proportions between them; and, at all events, the estate of Mrs. Holland, who concurred, is not entitled to any relief.—They also cited *Trafford* v. *Boehm*(*b*).

Mr. *Craig* was not called on for a reply.

The VICE-CHANCELOR:—

*Judgment.*

As to the frame of the suit, it is said, that it is by a plaintiff, who, being a mere legatee, had no primary right to sue for the recovery of assets, and that nobody but the

(*a*) 14 Beav. 291. (*b*) 3 Atk. 448.

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*Judgment.*

executor could sue in such a case. But when I find that one of the individuals who committed that breach of trust was that very executor against whom the bill seeks relief for the breach of trust, it is enough to put an end to any objection as to the right of the legatees to file this bill.

The suit being properly framed, the only question remaining is, whether or not the lending the money on mortgage was a transaction by the trustees of the fund or by the executor of the testator. When it was proposed to lend the amount on mortgage, it was under the dominion of the trustees. It became assets only on the death of Mrs. Holland, in 1848. In 1846, it was vested in the names of trustees, subject to the trusts of the settlement then subsisting. During the lifetime of Mrs. Holland, application was made to the trustees, while it was thus subject to the trusts of the settlement, to have the moneys, then standing in their names in the 3*l.* per Cents., sold out and invested. Accordingly, it was sold out under a power of attorney, executed by the then trustees, and invested on mortgage; and the transaction was conducted, as the trustees were told it was to be conducted, by Messrs. Gatty & Turner, who, for the purpose of this transaction, were the solicitors and agents of the trustees. The money was sold out under that power in the lifetime of Mrs. Holland; it was laid out on a mortgage, which, notwithstanding the assurance of Mr. Gatty, upon which the trustees seemed to rely in the transaction, turned out insufficient; and, according to the rules in this Court, I am bound to hold, that it was a breach of trust on the part of the three trustees who concurred in the investment on that mortgage.

But it is said, the real transaction was not that the money was sold out in order that it should be invested on mortgage; but, that the selling out was to put an end to the trusts of the settlement, and to hand over the money to the executor of Mr. Holland, under whose will Mrs.

Holland was tenant for life and Jodrell was executor. The only fact which seems materially to support this view of the case is, that Mrs. Holland concurred in the mortgage. But that is not enough to save the trustees of the settlement who sold out the fund and made the mortgage transaction their own. As to some of the letters that passed, there has been a confusion between the character of Mr. Edward Jodrell, as executor, and as one of the trustees; but this is unimportant, for it is plain that Mr. Edward Jodrell was recognised by his co-trustees as acting in the character of trustee of the settlement in the mortgage transaction. If anything further were wanting to fasten the liability on the trustees, the averments in the bill filed by them, in 1850, would be enough. Therefore, I must declare that the three trustees are liable to make good to the estate of Holland, the testator, the whole of the money that was produced by the sale of the stock; and that they must account for it to the present plaintiff as assets of the testator.

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*Jan.* 28*th*; *Feb.* 9*th*.

## JONES *v.* THOMAS.

A judgment-creditor assigned the debt, and afterwards became insolvent. The judgment-debtor died, and her executor received notices from three claimants, one from the assignee of the debt, another from the assignee of the judgment-creditor in insolvency, and a third from the attorney of the judgment-creditor, in respect of his lien for costs; the executor thereupon filed his bill of interpleader:—*Held*, on the authority of —— v. *Bolton*, that the bill could be sustained.

THIS was an interpleader suit. The following are the circumstances under which it was filed:—

Samuel Cannock brought an action of covenant against Elizabeth Jones, deceased, in the Court of Exchequer of Pleas at Westminster, and recovered final judgment therein, in 1848, for 60*l.* damages, and 133*l.* 3*s.* costs.

On error brought by Elizabeth Jones, in the Court of Exchequer Chamber, the judgment was in the month of June, 1850, affirmed, with 67*l.* 11*s.* costs.

Upon the appeal of Elizabeth Jones, the House of Lords, on the 5th of June, 1852, affirmed the judgment, with costs, to be certified by the clerk assistant, which were subsequently ascertained to amount to 217*l.* 1*s.* 6*d.*; but the certificate of the clerk assistant had not been obtained.

Elizabeth Jones died on the 15th of February, 1851; and Edward Jones, her executor, duly proved her will.

Mr. Evans, the attorney for James Cannock, advanced sums of money to carry on the action, amounting to 100*l.* and upwards, and he was entitled to a sum of money for his costs; and he claimed a lien on the judgment for such sums of money and costs, and gave notice to Elizabeth Jones of his claim.

By an indenture, dated the 1st of October, 1850, and made between Samuel Cannock of the one part, and James Abell of the other part, in consideration of the sum of 40*l.* to the said Samuel Cannock expressed to be paid by the said James Abell, the said Samuel Cannock assigned the above judgment obtained and registered against Elizabeth Jones, for the sum of 260*l.* 14*s.*, or other the sum or sums for which the judgment had been obtained and registered, and all interest which had become due or should thereafter

become due and payable thereon, unto the said James Abell, subject to the payment of such sum as might be lawfully due and payable to Mr. Evans as and for his costs in the action, after deducting certain money paid by the said Samuel Cannock on account thereof; and Samuel Cannock appointed James Abell his attorney, to sue out and prosecute execution upon the judgment or in the action.

Notice of this assignment was, shortly after its date, given to Elizabeth Jones.

Samuel Cannock became an insolvent debtor, and was discharged from custody in January, 1851, and his real and personal estate and effects became vested in the provisional assignee of the Insolvent Court; and on the 12th of February, 1851, William Thomas was appointed the assignee of the insolvent's estate and effects.

Mr. Thomas, the assignee in insolvency, on the 19th of February, 1853, gave Mr. Edwin Jones notice, alleging that the assignment to Abell was fraudulent, and claiming portions of the debt and costs.

Mr. Evans, in addition to his former notice, about the 22nd of February, 1853, served notices in writing on Edwin Jones, stating that he, as attorney for Samuel Cannock, had and claimed to have a charge or lien upon the damages and costs, and upon the judgments recovered by Samuel Cannock, or to which he should be entitled for his costs, charges, and expenses in or about the action.

Mr. Evans also gave notice that Mr. Abell had authorised him to receive such balance of the judgment and costs as might remain after satisfying his own lien, and he threatened proceedings for any injury to be occasioned by any delay in payment of the judgment debt or costs to himself, or to Mr. Abell.

Under these circumstances, Mr. Edwin Jones filed the present bill against Mr. Thomas, Mr. Abell, and Mr. Evans; by which, after stating the above circumstances, he alleged

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his readiness to pay the sums of money payable upon the judgment and for costs, and admitted assets of Elizabeth Jones come to his hands for the purpose; but he suggested that he did not know to whom the amount ought to be paid. By the bill it was prayed, that the defendants might be decreed to interplead, and that it might be ascertained to which of them the sums of 60*l.*, 133*l.* 3*s.*, 67*l.* 11*s.*, and 217*l.* 1*s.* 6*d.*, or other the sum which should be certified by the clerk assistant of Parliament, with interest, belonged; and asked leave to pay the amounts into Court, (which the plaintiff thereby offered to do,) for the benefit of such of the parties as might be entitled thereto; and for an injunction, restraining all the defendants from taking proceedings against him in respect of the debt and costs.

*Jan.* 28*th.* The case now came on for argument upon the hearing, and was adjourned.

*Feb.* 9*th.* The case was again brought on this day.

*Argument.*

Mr. *Baily*, Mr. *Dowdeswell*, and Mr. *Southgate* for the plaintiff.

They submitted that the circumstances exposed the plaintiff to the difficulty described by Lord *Redesdale*, as justifying a bill of interpleader (*a*).

The plaintiff has a right not only to be protected from double liability, but from double vexation; and it is enough if he be threatened by proceedings or claim by more than one party. This is the result of all the cases: *East and West India Dock Company* v. *Littledale* (*b*), *Fenn* v. *Edmonds* (*c*), *Morgan* v. *Marsack* (*d*); and it is sufficient if one of the claimants has the legal right, and the other has an equitable right only: *Hamilton* v. *Marks* (*e*); which was

(*a*) Mitf. Eq. Pl. 48.
(*b*) 7 Hare, 57.
(*c*) 5 Hare, 314.
(*d*) 2 Mer. 107.
(*e*) 5 De G. & S. 638.

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the case of a contention between a plaintiff, who had obtained a verdict at law, and a claimant by assignment from him. [The VICE-CHANCELLOR.—Can I direct the costs at law to be taxed?] What is due between the attorney claiming his lien and the client, can be ascertained, as was done in —— v. *Bolton* (*a*).

The plaintiff has properly brought Abell before the Court in this suit. It may be objected, that he claims a part only of the amount, and that the plaintiff's obligation is one, and cannot be split up by the creditor at law; but Lord *Cottenham* in *Suart* v. *Welch* (*b*), held, that a claimant of part only of a debt was properly brought before the Court; and that decision justifies the plaintiff in making Mr. Abell a defendant. If it be objected that payment to the plaintiff at law would discharge the plaintiff in equity, the answer is, that, the original defendant at law being dead, the proceeding must be either by writ of scire facias or by action upon the judgment.

Now, the proceeding upon a writ of scire facias was, prior to the recent statute, a new action: *Winter* v. *Kretchman* (*c*); and to a proceeding by sci. fa. by the assignee in insolvency, or by the insolvent judgment creditor, the plaintiff in equity is open to two views of his case, either, it may be alleged, by his assignment of the debt before insolvency, he was only a trustee, and, therefore, was properly the plaintiff; or it may be the case that the assignment was invalid, or only partly valid, and then the assignee in insolvency would be the proper person to recover at law: *Dangerfield* v. *Thomas* (*d*), *Barker* v. *St. Quintin* (*e*).— As to the lien of an attorney, they cited *Treviban* v. *Lawrence* (*f*) and *Hussey* v. *Welby* (*g*); and as to the right of the plaintiff to file this bill, they referred to *Langston* v.

(*a*) 18 Ves. 292.
(*b*) 4 My. & Cr. 305—319.
(*c*) 2 T. R. 45.
(*d*) 9 A. & E. 292.
(*e*) 12 M. & W. 441.
(*f*) 2 Ld. Raym. 1048.
(*g*) Say. 218.

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*Argument.*

*Boylston* (*a*), *Martineas* v. *Helmut* (*b*); and, as to costs, to *Cowton* v. *Williams* (*c*).

Mr. *J. Gray* for the defendant Evans.—This suit is altogether unnecessary. The plaintiff in equity might have safely paid the whole debt and costs to Mr. Evans, who, as the attorney in the action, could have given him an effectual discharge. No assignment of the debt could alter this right in the attorney.

The assignment to Abell was of a part only of the debt; the debt, therefore, upon the insolvency, passed entire to the defendant Thomas, between whom and Mr. Evans there is no conflict of claim.

Mr. *Malins* and Mr. *Walford* for the defendant Thomas. —On the insolvency of Cannock, Thomas was the only person who could have sued out the writ of fi. fa.: *Connop* v. *Challis* (*d*), —— v. *Bolton* (*e*), has been relied on for the plaintiff; but that case is distinguishable from the present in this respect, that there the plaintiff at law disputed the lien of the attorney, whilst in the present case no one disputes Mr. Evans' lien.

It is admitted, that, in some of the older cases, the language used is very strong, but the rule has been modified. The passage cited from Lord *Redesdale's* work on Equity Pleading, shews that there must be some difficulty to justify the filing of a bill of interpleader, some real danger, and not a mere claim.

In *Glynn* v. *Locke* (*f*), Lord *St. Leonard's* said, he would not allow a bill of interpleader lightly; and in *Crawshay* v. *Thornton* (*g*) a bill of interpleader was disallowed as

(*a*) 2 Ves. jun. 101.
(*b*) 2 V. & B., n. 1, p. 412, of the 2nd edit. only.
(*c*) 9 Ves. 107.
(*d*) 2 Exch. 484.
(*e*) 18 Ves. 292.
(*f*) 3 Dru. & War. 11.
(*g*) 2 My. & Cr. 1.

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against two claimants of the same property in the hands of the plaintiff. These two cases go upon the reasonable rule, as laid down by Lord *Redesdale*, that there must be some real danger to the plaintiff to justify an interpleader suit. No such real danger exists here. If the plaintiff, instead of putting this bill on the file, had informed the defendants of his intention, no difficulty would have been placed in his way, and he might have safely paid the amount, either to Mr. Thomas, or to Mr. Evans, as the attorney.

Mr. *Hall*, for the defendant, disclaimed all title; and said, that he never claimed any right directly against the plaintiff to have the amount of the plaintiff's debt paid to him.

The VICE-CHANCELLOR:—

*Judgment.*

The plaintiff seems justified by authority in filing this bill of interpleader. The case of —— v. *Bolton* (*a*), decided by Sir *William Grant*, goes much further than the present case. The creditor in that case was entitled under a judgment to sue out execution against the plaintiff in equity, and the only other claimant was the creditor's own attorneys, who claimed a lien on the judgment for the costs.

That was a case in which, if in any case, the plaintiff in equity, who sought the protection by an interpleader suit, might have got from one of the claimants a good discharge of the legal title. The Court, however, because there was the simple notice by the attorney of the judgment creditor, that he claimed a lien for his costs, entertained the bill, and considered it a case for interpleader by the debtor on the judgment. The present case is one of much more complication, for there are here three distinct notices: one by

(*a*) 18 Ves. 292.

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the attorney of the judgment creditor claiming a lien; secondly, a notice by the assignee of the judgment creditor in insolvency; and thirdly, by a person who claims under an actual assignment of the judgment. In this state of things, unless the case of —— v. *Bolton* was wrongly decided, the debtor on the judgment is entitled to protection by bill of interpleader.

But what excited doubt in my mind was, the absence from the record of the judgment creditor himself; there being no scire facias, no person was brought before the Court as the defendant, who was competent to give the plaintiff a good discharge for the debt; and it was impossible, from the frame of the bill, to say, whether all the defendants, or one or which of them, could give a good discharge. But that doubt is removed by the circumstance of the death of the judgment debtor, which created a right of suit in certainly more than one of the present claimants who are defendants; and I accede to Mr. *Baily's* argument, that this is very much like the case of the obligor of a bond, and an obligee, who claims the debt after he has assigned it to a person who has given notice of the assignment to the obligor.

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## ODDY *v.* SECKER.

*Feb.* 22*nd.*

It is no objection to a claim or bill filed for an account against a confidential agent, that he has been also employed as a solicitor in respect of the same matter.

THIS claim was filed by John Oddy, the surviving executor of Phœbe Ellen Brett, the surviving executrix of the testatrix Sarah Slade; and it asked that an account might be taken of the personal estate of Sarah Slade, come to the hands of John Secker, or other persons, for her use; and that the said John Secker might be charged therewith and interest, and might be ordered to pay what, on the taking of such account, should be found due.

The testatrix died on the 20th of August, 1843, having appointed Phœbe Ellen Brett her executrix, who duly proved her will on the 20th December, 1843, and shortly afterwards authorised the defendant, John Secker, as her attorney and agent, to get in and administer the personal estate of the testatrix; and the said defendant took possession of the estate and effects of the said testatrix, more than sufficient to pay her debts, funeral expenses, and legacies, but never rendered any account to Phœbe Ellen Brett during her lifetime. She died on the 26th of March, 1848, having appointed two executors, of whom the present plaintiff is the survivor.

The claim charged, that the defendant had never properly accounted for the personal estate of the said testatrix, Sarah Slade, received by him as the agent and attorney of the said Phœbe Ellen Brett, though repeatedly required so to do; and charged, that a considerable sum was due from the said defendant in respect of the moneys so received by him.

Mr. *J. H. Palmer* appeared for the claim.

*Argument.*

Mr. *Shebbeare*, for the defendant, objected to the claim, on the ground that it was an attempt to investigate, by

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way of claim, an attorney's bill, in lieu of proceeding under the Solicitors Act(*a*).

The VICE-CHANCELLOR:—

In this case it is contended, that the plaintiff ought to have proceeded, not by claim, but by petition under the Act. It appears the defendant was employed by Mrs. Brett as her solicitor, and also as her confidential agent, in receiving, paying, and managing, on her behalf, the administration of an estate of which she was executrix. There is no doubt, that, where the relation of agency and confidence exists, and the transactions involve accounts, this Court recognises the right of the employer to proceed by bill or claim, to have the accounts taken under the direction of this Court. On that principle, the Court acted in the case of *Lord Hardwicke* v. *Vernon*(*b*), and in many other cases. If this defendant were not a solicitor, but merely a confidential agent, the right to sue him by bill or claim for an account could not be disputed. I am unable to see how the circumstance, that the defendant, besides being the agent, acted also as the solicitor, can deprive his employer of that right. I shall, therefore, direct the account to be taken in the usual way, of all the defendant's receipts and payments while acting on behalf of Mrs. Brett in the matters in the bill mentioned; and also, that he do, within a month, deliver his bill of costs against Mrs. Brett, and that it be taxed in the usual manner.

(*a*) 6 & 7 Vict. c. 73. (*b*) 14 Ves. 504—511.

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## HOYES *v.* KINDERSLEY.

*Feb. 25th.*

THIS was an exception to the report of Sir *William Horne*, whereby he certified, that the sum of 664*l.* 19*s.* 6*d.* Bank Annuities, formed a part of the personal estate of Louisa Dott in the pleadings mentioned, whereas he ought to have certified that it was a part of the personal estate of the testator James Dott.

The bill was filed to administer the estate of the testator James Dott, who died on the 22nd of November, 1843. Mrs. Dott died on the 24th of July previously.

It appeared, from the evidence adduced before the Master, that, from the year 1828, the testator kept a banking account in London with Messrs. Masterman, and in Southampton with Messrs. Maddison. In that year, the testator, being of an advanced age, transferred to his wife the management of the Southampton account, and authorised her to draw cheques in her own name for the purpose of defraying the domestic expenses.

For some time the bankers at Southampton allowed Mrs. Dott to overdraw her account to a considerable amount, which was subsequently liquidated out of monies belonging to the testator in their hands. From 1830 the account was balanced half-yearly.

On the 21st of October, 1830, the bankers at Southampton, having in their hands the sum of 800*l.* 2*s.* 6*d.*, the property of the testator, it was invested in Stock, in the name of Mrs. Dott; but there was no evidence to shew the circumstances under which the purchase was made, further than that the purchase was made out of the dividends placed by the testator under the management of the wife.

The dividends on the Stock were paid to the banking account of Mrs. Dott, and were applied, with the other monies, in defraying the domestic expenses.

The dividends of Stock purchased during coverture in the name of the wife, out of funds placed at her disposal for family purposes by her husband, then an aged person, were paid into a bank to her account, and by her applied for domestic expenses. The wife dying in the husband's lifetime, in a suit to administer the husband's estate, *held* that the presumption that the Stock was a gift to the wife, arising from the purchase being made in her name, was rebutted by the mode of dealing with the dividends.

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*Argument.*

It appeared, that, shortly after the opening of the account in Mrs. Dott's name, the drafts by Mr. Dott were comparatively few, and for small amounts. The cheques drawn by Mrs. Dott were, during the same period, for a considerable amount.

Mr. *Malins* and Mr. *MacNaghten*, in support of the Master's decision.—In order to constitute a gift between husband and wife or father and child, any unequivocal act, indicating an intention on the part of the husband or of the father to make the gift, is sufficient. In *Dummer* v. *Pitcher* (*a*), Lord *Brougham*, adopting the language of Lord *Eldon* in *Wilde* v. *Wilde* (*b*), said, that "where a husband purchased Stock in the joint names of himself and his wife, it was a primâ facie gift to her in the event of her surviving." The qualification, in that case, was because the Stock was in the joint names and would go to the survivor; but if, instead of being purchased in the joint names, the Stock had stood in the sole name of the wife, the condition of survivorship would have become immaterial. This was a stronger case, because the Stock was in the sole name of the wife. In *Lucas* v. *Lucas* (*c*), the husband transferred 1000*l.* South Sea Annuities into his wife's name, and Lord *Hardwicke* sustained the gift, though the property could not pass at law. [The VICE-CHANCELLOR. —I think there is no doubt about the law, which is very clearly laid down by Sir *Thomas Plumer* in the case of *Walter* v. *Hodge* (*d*).] The Master of the Rolls decided that case expressly on the want of evidence to shew the fact of the gift. All that was proved was, that the testator gave a note case to his wife, which the learned Judge said did not amount to evidence of an absolute gift. Here, there was a purchase of Stock in the name of the

(*a*) 2 My. & K. 262, 273.
(*b*) Roper, Husb. and Wife, Jacob's edit., p. 54.
(*c*) 1 Atk. 269.
(*d*) 2 Swanst. 104.

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*Argument.*

wife, which was a far more unequivocal act than the delivery of bank notes into the hands of the wife. The testator could not have purchased the Stock in the wife's name to enable her to receive the dividends, because the Bank will not pay the dividends to a married woman without the consent of her husband. The only possible motive for the proceeding was to make a gift of the Stock to the wife.—*Caton* v. *Rideout* (*a*) was also cited.

Mr. *Elmsly* and Mr. *Piggott* appeared on the same side.

Mr. *Craig* and Mr. *Bagshawe* supported the exceptions.

The VICE-CHANCELLOR:—

*Judgment.*

I cannot agree with the Master in the conclusion to which he has come in this case. There is no doubt that this Court will support a gift by a husband to a wife during coverture for her separate use; but, as stated by Lord *Alvanley*, and repeated by Sir *Thomas Plumer* in the case of *Walter* v. *Hodge* (*b*), there must be an unequivocal act by which the husband divests himself of the property and places it at the disposal of the wife. The transfer of Stock into the name of the wife is primâ facie evidence of a gift to the wife, but it may be rebutted by evidence tending to shew that no gift was intended. In *Lucas* v. *Lucas* (*c*), the Court held, that there was strong presumptive evidence of an intention to give the South Sea Stock to the wife; and there being nothing to rebut it, the gift was supported by this Court.

But, in this case, the circumstances all negative the presumption that would otherwise arise from the fact, that the Stock was purchased in the name of the wife.

In the first place, there is no evidence to shew the

(*a*) 1 Mac. & G. 599. (*b*) 2 Swanst. 104. (*c*) 1 Atk. 269.

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Stock was ever purchased by the direction of the husband, who, at the date of the purchase, was of a great age, and had to a great extent abdicated his duties as the head of the establishment. In order to relieve him from the burden of these duties, cheques were drawn by the wife. It appears that two accounts were kept,—one by the wife and the other by the husband; and from a time anterior to the purchase of the Stock, the drafts by the husband were small, while those of the wife amounted to 3000*l.* No doubt the account on which the wife was authorised to claim, must have been replenished from the resources of the husband, but there is no evidence to shew that this was done by the direction of the husband.

The manner in which the dividends were dealt with seems to me inconsistent with the notion, that the Stock was at that time the separate estate of the wife. They appear to have been paid into that account, on which she had authority to draw, and applied, not for her separate use, but for the common expenses of the household. That circumstance rebuts the presumption arising from the purchase being made in the wife's name. I am of opinion, that the Master was wrong, and the exception must therefore be allowed.

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*March 4th.*

## Re DAWSON.
## DAWSON *v.* JAY.

A QUESTION was raised on these petitions as to the custody of an infant, aged eleven years and four months.

The order of a foreign Court appointing a guardian of an infant, the child of a British subject, will be recognised in this Court with the respect due by the comity of nations to the order of a foreign Court, but it does not confer on the appointee the character of guardian in this country.

The infant was the daughter of a British subject named Dawson, who, at the age of sixteen years, emigrated to America, where he engaged in commerce, and obtained letters of naturalization in that country. He subsequently married a lady named Jay, by whom he had three children, of whom one, the infant, survived him. In 1846 Mrs. Dawson died. At the date of her death, and for a considerable time previously, Miss Dawson, the sister of Mr. Dawson, resided with the infant, and continued to remain with her in Mr. Dawson's house until the death of that gentleman in 1852. On his death the infant became entitled absolutely in possession to real estate of the value of 60,000 dollars, the property of her mother, which was situated in New York. After the death of Mr. Dawson an application was made to the Surrogate of the city and county of New York by Mr. R. L. Dawson, a paternal uncle of the infant, that he might be appointed her guardian; but on this application being opposed by Mrs. Elizabeth Clarkson Jay, the infant's maternal aunt, an arrangement was made on the 2nd of June that Miss Dawson should be appointed guardian, upon an undertaking that the infant should be brought up as an American subject.

The undertaking (which it was said was required by the law of New York) was as follows:—

"So long as I am guardian to Mary Jay Dawson, whether till she is fourteen or afterwards, if she elect me as her guardian at that age till she is twenty-one, I promise to bring her up in the United States, teaching her to consider it as her home, paying only an occasional visit to England. MARY ANN DAWSON."

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*Statement.*

While these proceedings were going on, and while the child was in New York, another uncle, Mr. F. Dawson, without Miss Dawson's knowledge, on his own application had been appointed guardian by the Surrogate of Baltimore, in the State of Maryland. Upon this Miss Dawson wrote to Miss Jay repudiating the undertaking she had given, on the ground that she had no authority to enter into such an arrangement, and renouncing her character of guardian. The infant was subsequently brought back to the State of New York. Miss Jay immediately applied to the Supreme Court of New York for an injunction to restrain the removal of the infant from the jurisdiction of the Court of New York. The order for an injunction was granted; but when an attempt was made to serve it, the infant was clandestinely taken from Miss Dawson's abode through a back door, by a servant who was much attached to her; and in October, 1852, was brought by Miss Dawson to this country, where she had ever since remained with her paternal relatives.

On the 2nd of October, after the infant had left America, the appointment of Miss Dawson was revoked, and Miss Jay was appointed guardian by the Surrogate of the City and State of New York.

Miss Jay subsequently came to England, and on her arrival presented her petition, praying that she might be appointed guardian to the infant.

A cross petition was also presented by Archdeacon M'Donald, a relative ex parte paternâ, and the next friend of the infant in the suit of *Dawson* v. *Jay*, praying that a Mr. Pudsey Dawson, the infant's cousin, together with Miss Dawson, might be appointed guardians.

*Argument.*

Mr. *Wigram* and Mr. *Lawford* for the guardian appointed by the Surrogate of New York.—The infant was born in New York. Her mother was an American by birth, her father by naturalization and domicil, and the whole of her property is situated in New York. She is therefore

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*Argument.*

an American subject. If it be contended that the appointment of a guardian by the Surrogate does not render the infant a ward of Court, it is clear, that, immediately on filing a bill in the Supreme Court of the United States, she became a ward of Court in that country. If so, it is clear the appointment by the Surrogate of New York was the act of a competent officer in a matter in which he had jurisdiction, and must be respected by tribunals with concurrent jurisdiction. It is not denied, that this Court has jurisdiction to entertain the question; but it does not follow, that it is bound to interfere, if, in its discretion, it sees that its interference is unnecessary. It is submitted that this Court will regard the act of the Surrogate precisely as if it were an act done by a Court of concurrent jurisdiction in this country. It was laid down by Mr. Burge, Vol. 3, pp. 1002–3, "that the appointment of tutor or guardian, so far as it confers the care or custody of the person of the minor or lunatic, cannot, consistently, with the principles of international jurisprudence, be made by any other judicial tribunal but that of the country to which the minor or lunatic was by his residence subject. According to the opinion of foreign jurists, every judicial tribunal is bound to recognise this appointment." Here the infant was by birth an American, and had resided in America until furtively withdrawn from it. But not only was the infant an American by birth, but the whole of her property (which was in truth what gave Courts jurisdiction over infants) was immoveable property, situated in a foreign country, over which this Court had no sort of jurisdiction except by the comity of nations: Burge, 1006. To refuse to recognise the appointment of the American Court would be to ignore the only principle which gave the Court jurisdiction (*a*).

Mr. *Bacon* and Mr. *Cairns* for the paternal relatives.—

(*a*) See on this subject Story's Conflict of Laws, s. 495 et seq.

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The appointment of a guardian is valid only within the jurisdiction of the Court by which the order is made, even when made by a competent Court in a British colony: *Ex parte Watkins* (*a*). The argument in favour of the authority of the American over the person of his ward in this Court was considered and approved of by Lord *Brougham* in the case of *Johnstone* v. *Beattie* (*b*), but was not adopted by the House of Lords in that case. It was settled in that case that the domicil is immaterial. The infant, though born in New York, must be taken to be a natural born British subject; because, by the 13 Geo. 3, c. 21, it was enacted, that all "persons born out of the ligeance of the Crown of England, whose fathers were entitled to the rights and privileges of natural-born subjects of the Crown of England, shall and may be adjudged and taken to be natural-born subjects of the Crown of Great Britain, to all intents, constructions, and purposes whatsoever." It could not be said that these privileges had been lost by the infant's father becoming naturalized in America, because it is clear that the privileges are the right of the children: *Fitch* v. *Webber* (*c*). The argument in favour of the validity of the appointment of guardian by the Surrogate of New York could not be maintained, because, at the time the appointment was made, the infant was out of the district, within which, by the American law, the Surrogate's jurisdiction must be exercised.

*Judgment.*

The VICE-CHANCELLOR:—

The first petition presented in this case on behalf of the infant sets forth the claim of Miss Eliza Jay, her maternal aunt, to the guardianship of the infant. This claim is supported on the ground that the infant is by origin and domicil a citizen of the State of New York; that the greater part,

(*a*) 2 Ves. sen. 470, a. (*b*) 10 C. & F. 96. (*c*) 6 Hare, 51.

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if not the whole, of the infant's fortune consists of property in the State of New York; that Miss Jay is the guardian appointed by the surrogate—that is, by the proper tribunal of that State; and that the infant was furtively, and by evasion of an injunction granted by the Supreme Court of New York, removed from America, and brought by her maternal aunt, Miss Mary Ann Dawson, to England, in October, 1852; that this was done in violation of a solemn promise in writing by Miss Mary Ann Dawson, that she would bring up the child in the United States, teaching her to consider that country as her home. Under these circumstances, Miss Jay asks this Court to appoint her guardian, with a view to the infant returning to the United States, and being brought up and educated there.

The order of the surrogate of New York, which appoints Miss Jay guardian, is to be recognised and treated in this Court with the respect due by the comity of nations to the order of a foreign Court. But it does not confer on Miss Jay the character of guardian in this country, and accordingly this petition, supported by Miss Jay, asks that this Court may appoint her guardian, or, if not, that some other fit and proper person may be appointed, and that all proper directions may be given concerning the infant.

The father of the infant was a British subject, and is said to have been, after many years' residence in America, naturalized as a citizen of the United States. Being born in allegiance to the Crown of England, this naturalization, though it conferred on him the rights of an American citizen, did not absolve him from his duties or deprive him of his rights as a British subject; and his child, born in America, of a marriage contracted with an American lady, and with an American domicil, and under the protection of American laws, is nevertheless a subject of the Crown of England.

This child, thus connected with both countries, and with

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her nearest relatives of equal degree in both, was, for the six years between the death of her mother in 1846, till after her father's death in 1852, living with her paternal aunt, Miss Dawson, an English lady, in New York, enjoying at the same time the society of her American maternal relatives, with perfect harmony among them all. All the maternal relations seem to have felt that Miss Dawson was the most proper person to be the guardian of the child.

The eagerness of Miss Jay to secure to the child an exclusively American education has led to that state of things, which has, for a time, interrupted the previous harmony between the two classes of relatives. The spirit of nationality which actuated Miss Jay in resolving to have the child brought up in the United States as her home is natural and even laudable. But some regard was due to a similar spirit in the English relatives in favour of a home and education in England. It was somewhat too arbitrary a determination by herself in favour of her own views, which exacted that reluctant conditional promise, and excited those natural fears which induced Miss Dawson to abandon the guardianship rather than abide by the condition on which she held it, and drove the paternal relations to remove the child to this country in the manner complained of.

It is the duty of this Court to see that such an arrangement is made as to the guardianship, residence, and education of this child, as shall best tend to maintain her connection with both classes of relatives and both countries. But the proposal which has been made—that I should make such an order as would at once remove the child from the care of Miss Dawson, and deliver her to Miss Jay as her guardian, that she may immediately return with her to America, to be brought up as an American, and not as an English woman, seems conceived in a spirit rather exclusive and illiberal. To act upon it in

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the way proposed would, I am perfectly satisfied, disturb the present happiness and comfort of the child.

As to the argument here in favour of the right of Miss Jay as the guardian appointed in America, it cannot be maintained. Looking at it with all the respect due by the comity of nations to the order of an American Court, there seem to be some peculiarities as to the guardianship conferred by the Surrogate of New York. His jurisdiction seems to be arranged on very restricted views. Although all the maternal relations of this child are citizens of the United States, none of them are regarded by the Surrogate except the two aunts who reside in the city of New York. Two maternal uncles, one residing in the county of West Chester, in the State of New York, but beyond the limits of the city of New York, and another maternal uncle residing at Washington, in Virginia, are beyond the view of the Surrogate. The paternal uncles and aunts being English, are treated one and all as foreigners. But even the nearest relations, with the highest rights of citizenship, unless residing within the county of New York, appear to have had no voice before the Surrogate. This arrangement of the jurisdiction may be sufficient for the class of children whose nearest relatives live within the bounds of the city of New York, but can scarcely be suitable for those children of a higher class in society, whose relatives, most interested in their welfare, and most likely to promote it, may live beyond such narrow limits. For this reason the laws of America treat the powers of a guardian so appointed as strictly local. Mr. Kent, in his "Commentaries on American Law" (vol. ii. page 227), speaking with the authority due to more than twenty-five years of experience as a judge in New York, says, that "a guardian appointed by the Surrogate or by will is as much under the superintendence and control of the Court of Chancery, and of the power of removal by it, as if he were appointed by the Court." And, moreover, he says, that

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"the rights and power of the guardians over the person and property of their wards are stictly local, and cannot be exercised in other States."

It seems, therefore, that the appointment of Miss Jay to be guardian by the Surrogate of New York is so strictly local, that she could not, according to the American law, exercise it in the neighbouring State of Maryland, even if the case did not present the singularity of another guardian of the same infant appointed by the State of Maryland. Some degree of practical inconvenience and disturbance of comfort may be apprehended from orders pronounced by these conflicting jurisdictions; and it must be for the benefit of the child that a scheme should be so arranged as to secure to her the greatest advantages as to guardianship, residence, and education, that can be derived from her connection with both countries, and tend to the maintenance of a kindly and proper intercourse with her American as well as with her English relations. With these views, it seems to me, on a full consideration of the evidence in this case, and after having myself seen and conversed with the infant, as well as with Miss Jay, Miss Dawson, and other relations of the child, that it is fit and proper, and for her benefit, that Miss Jay should be associated in the guardianship with Miss Dawson and Mr. Pudsey Dawson; and that the usual and proper inquiries should be made before me, in Chambers, as to the age and fortune and relations of the infant, with liberty to the guardians, or any of them, to propose a scheme for her residence, maintenance, and education.

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## PATTISON *v.* GRAHAM.

*March 16th.*

ANTONY PATTISON, the testator in the cause, by his will, dated the 22nd of August, 1844, gave and bequeathed his freehold and leasehold estates and other property to his son Peter Pattison and to his daughter, the plaintiff, Margaret Pattison, upon trust to pay the annual income thereof to his wife for her life, and after her death upon trust to convert the same into money, and to pay one legacy of 500*l.* to his daughter Mrs. Harding; and as to the residue, upon trust to divide the same equally between his son Peter Pattison and his daughter Margaret Pattison, whom he appointed his executor and executrix.

The testator died on the 29th of August, 1844, and his will was proved in the following December by the plaintiff, the said Peter Pattison, the latter of whom took the chief part in the management of the testator's property.

On the 12th of October, 1847, a fiat in bankruptcy was awarded against Peter Pattison; and R. C. Randal and W. Clay were appointed creditors' assignees; W. Turquand was appointed official assignee, and on his death was succeeded by the defendant G. S. Graham.

Subsequently to the bankruptcy, a part of the testator's property, with the concurrence of the assignees, was put up for sale by public auction, and knocked down to Mr. Harding, who was accordingly declared the highest bidder, for a sum of 2070*l.*, and paid the deposit to the auctioneer.

Mr. Harding acted as the agent of a Mr. Fisher, who accepted the title; and a conveyance was accordingly prepared by the solicitor of the purchaser, which was approved by the plaintiff and Peter Pattison. When, however, the draft conveyance was tendered to the assignees for execution, those gentlemen refused to approve such draft or any draft conveyance of the property unless the plaintiff permitted them to receive out of the purchase

The official and creditors' assignees of a legatee and executor, who became bankrupt, claimed from the testator's estate a sum of 350*l.*, and refused to concur in a sale unless paid that sum. In consequence of their refusal a bill was filed by the co-executor to administer the assets, and it appearing that nothing remained due in respect of the bankrupt's share, the Court ordered the assignees to pay the costs of the suit.

*Semble*, where reasonable evidence of the state of accounts in which a bankrupt is interested, is tendered to his assignees, they are not entitled to insist on a judicial decision on their claims.

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moneys the sum of 350*l.* as the further share of the bankrupt The assignees having persisted in their refusal, the plaintiff's solicitor, Mr. Walter, on the 27th of January, 1851, sent to Messrs. Mardon & Pritchard, the solicitors of the assignees, an account of the amount received by the bankrupt, the result of which was to leave a sum of 533*l.* 0*s.* 4*d.* due from him to the plaintiff. The purchaser having threatened to file a bill for specific performance, the plaintiff's solicitor addressed to the solicitors of the assignees the following letter, accompanied by a copy of the accounts, and a proposal that the assignees should receive a sum of 109*l.* 15*s.* 7*d.*, together with one moiety of the interest due on the purchase money.

"12, Furnival's-inn, 16th of May, 1851.

"Re Pattison, 80, Cornhill.

"Dear Sir,—Having recently received a communication from Mr. Greville relative to the investment or deposit of this purchase-money in the hands of some third party, pending the discussion of the points on which we differ, I have carefully considered it in connexion with the difficulties which seem to arise in our coming to an agreement upon the points in difference; and in order to put an end to all controversy between us and to complete the purchase at once, I have advised Miss Pattison, without prejudice to her right to assert higher claims, to make such concessions as appear by the inclosed statement of accounts; and trust the assignees will see the propriety of completing the purchase on this basis without further delay. In making these concessions, however, Miss Pattison wishes it to be distinctly understood that she has gone as far as she possibly can; and if the assignees should refuse to complete the purchase and divide the monies according to the statement, and Miss Pattison should thus be driven to assert her rights, she will not consider herself precluded from enforcing her full claims. Yours truly,

J. WALKER."

In reply to the above letter, the assignees returned the following answer:—

"Re Pattison.

"Dear Sir,—We laid the proposition contained in your last letter to us before the assignees, and they, aided by the official assignee's and the accountant's opinion of what is really due to us, have instructed us to say that they are very desirous to effect an amicable arrangement, and to avoid any suit or controversy; and therefore they are willing to take for the matters in difference, in lieu of their present claim on the purchase-money and share of the other items in the account, the sum of 350*l.*; but if your client will not agree thereto, we purpose, on behalf of the assignees, to submit the following points to the Commissioner's decision, which are still questions in dispute between us:

"1. As to the debt of 350*l.*

"2. The right of the mortgagee to charge commission.

"3. As to the rent payable after the termination of the lease to Peter Pattison.

"4. As to the property taken to pay taxes due by the estate to the trustee.

"5. As to the further sums to be debited to Miss Pattison.

"6. As to the right to tax the costs.

"Be so good as to inform us your client's determination to this offer; the assignees' costs to be paid out of the mortgage money. Yours truly,

"24th of May, 1851. MARDON & PRITCHARD."

On the 28th of the same month the plaintiff's solicitor sent a reply to the above letter, declining the proposed terms; and on the 8th of July the bill was filed.

On the 9th of February, 1853, the cause came on to the hearing, when the usual inquiries were directed. The accounts had been subsequently taken; from which it ap-

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peared that the bankrupt had received the full amount of his share in the testator's estate, and that, consequently, nothing remained due to the assignees.

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The case was now brought on for further consideration, but the only question to be determined was, by whom the costs of the suit were to be paid.

*Argument.*

Mr. *Malins* and Mr. *Busk*, for the plaintiff, contended that, upon the ordinary principle, the assignees were bound to pay the costs of the suit. By insisting on a demand which had turned out unfounded, they had made the suit necessary.

Mr. *Bacon* and Mr. *Eddis* for the assignees.—The assignees were bound, on behalf of the creditors of the bankrupt, to insist upon an investigation of the accounts; and had they failed to have the accounts taken, and it had turned out that part of the bankrupt's assets had been thereby lost, they would be personally liable to make it good. Where any doubt existed of the accuracy of the accounts in which the bankrupt was interested, the assignees were entitled to have a judicial decision on the amount due to the bankrupt's estate.

Mr. *Faber* appeared for the purchaser.

Mr. *Bazalgette*, Mr. *Sheffield*, and Mr. *Nichols*, for other parties, who took no part in the contest.

*Judgment.*

The VICE-CHANCELLOR:—

This is a very important question. The bill is filed to administer the estate of the testator, and it prays also that the sale may be completed, and the necessary accounts taken. The cause of the suit was a claim by the assignees of the bankrupt, who refused to concur in the sale to the purchaser, or to adjust the accounts upon

any other terms than that they should be paid a sum of 350*l.*, together with their costs.

The ordinary rule upon which this Court disposes of the costs is reasonably plain. If a suit is occasioned by a demand which the result proves to be unfounded, as a general rule the costs should be borne by the party whose unjust claim has led to the litigation. Unless, therefore, there is something in this case which exempts it from that general rule, the assignees, whose unfounded claim has led to this suit, must pay the costs.

It is contended, however, that the position of assignees is peculiar, and that, having regard to that position, the conduct of these gentlemen was only in accordance with their duty. The proposition is carried to the length of asserting that assignees, as a matter of right, are entitled to have a judicial decision on the state of the accounts between the bankrupt and the testator's estate. In my opinion that proposition cannot be sustained. The assignees of a bankrupt have no right to drive a person into this Court, except on the ordinary principle that the costs must be paid by the party by whose unfounded claim the litigation has been occasioned. I can recognise no special right in assignees that exempts them from what is the ordinary and the just rule on the subject of costs.

In this case it appears that satisfactory accounts were tendered to the assignees and repudiated by them. Moreover, the objection they raised in taking the accounts has rendered what might have been done in a few hours the work of years. I cannot help seeing also, that the effect of their conduct has been such that the plaintiff would have been the gainer if she had submitted to their demand, unjust as it was. However, they insisted upon a judicial decision, and they have enjoyed it; and the result has been to shew that they are entitled to nothing. But, in obtaining that decision the assignees have occasioned large costs, which have been still further increased by

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the improper objections that have been raised. It would be contrary to every principle of justice to throw those costs upon the plaintiff. I have, therefore, no alternative but to direct that the whole costs of the suit shall be borne by the assignees, and that the costs of those parties which are commonly payable by the plaintiff shall be recovered by her from the assignees.

*March* 17*th*.

## HOBBS *v.* PARSONS.

A testator directed the proceeds of his real estate to be invested in stock, upon trust, to pay the dividends to his two daughters, in equal shares, during their natural lives; and, "from and after their decease, to go to their respective children for their support and maintenance, until they shall attain the age of twenty-two years severally, they to receive the principal and interest as they attain such age, in equal shares;" should either die before twenty-two, the shares of either of them so dying before the attainment of such age to be equally divided among the survivors or survivor of them:—*Held*, that the children took vested interests.
The devesting clause was held to be void.

JOHN PARSONS, by his will, having directed his just debts to be paid, made the following gifts:

"I give, devise, and bequeath unto my two sons, George Parsons and John Parsons, the sum of 3000*l*. stock, in the New 3½ per Cents., which now stands placed in my name; Upon trust that they my said trustees, and the survivor of them, their executors, administrators, and assigns, shall receive and pay the interest and dividends thereof half-yearly unto Elizabeth my dear wife, for and during her natural life, if she should so long continue my widow, but no longer; and from and immediately after her decease or marriage, I give and bequeath the said sum of 3000*l*., and all interest due thereon, equally among my four children, George Parsons, Elizabeth Hobbs, Nancy Wilcox, and my son John Parsons, their executors, administrators, and assigns."

The testator then devised certain freehold and copyhold land to each of his sons, bequeathed his household furniture to his wife for her life, and, after her death, equally among his four children; he then gave his real estate at Warsash to his daughters, Elizabeth Hobbs and Nancy Wilcox, in equal shares, with a direction that the whole of it should be absolutely sold as soon as a fair price could be

obtained, by the full authority and direction of his said executors. The will then proceeded as follows:—

"I also direct the money from the produce from the sale of the said estates should be divided between my two daughters in equal shares; I also direct the money of the produce of the sale of the estates shall be laid out and invested in the names of my executors as (*a*) 'the' my said trustees, in one of the Bank Stocks in the Bank of England, whichever they may judge best, as also their respective parts or shares of the 3000*l.*, which comes to each of them after the death of my dear wife, as also their proportion, parts, or share of the residue remainder, if any, which comes to my two daughters, Elizabeth Hobbs and Nancy Wilcox, shall also be invested in the same stock, in the names of my executors as (*a*) 'the' my said trustees or the survivor of them, they to receive half-yearly the dividends and interest thereof, apply and pay the same to Elizabeth Hobbs and Nancy Wilcox in equal shares, for during the natural lives of the said Elizabeth Hobbs and Nancy Wilcox respectively. And from and immediately after their decease, to go to their respective children for their support and maintenance, until they shall attain the age of twenty-two years severally, they to receive the principal and interest as *the* attain such age in equal shares. Should either of them die before the attainment of twenty-two years, I direct the share or shares of either of them so dying before the attainment of such age, to be equally divided among the survivor or survivors of them.

"I also give and bequeath unto my daughter Elizabeth Hobbs the sum of 5300*l.* 3½ Stock, with all interest due thereon, which now stands placed in my name, for and during her natural life; and from and immediately after her decease I give the said sum of 5300*l.* Stock, with all interest due thereon, among all her said children, or so many of them as may be then living at the time of her decease, in

(*a*) *Sic* in orig.

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equal shares. Should their mother die before each child should attain the age of twenty-two years, I direct the interest and dividends thereof should be applied for the support and maintenance of all the said children by the name of Hobbs, by my executors, until they severally attain the age of twenty-two years. In case of the death of either of the said children, I direct the share or shares of either of them so dying before the attainment of such age to be equally divided among the survivors or survivor of them, the principal with all interest due thereon to be paid to each of them as they shall severally attain the age of twenty-two years by my executors as *the* my said trustees or the survivors of them (*a*). I also give, devise, and bequeath unto my daughter Nancy Wilcox the sum of 5300*l.* Stock, with all interest due thereon, in the New 3½ per Cents, which now stands placed in my name, for and during her natural life; and from and immediately after her decease, I give the said sum of 5300*l.* with all interest due thereon unto and among all her said children, or to so many of them as may be living at the time of her decease, in equal 'shares,' my executors to apply, receive, and pay the interest and dividends thereof half-yearly, until they shall severally attain the age of twenty-two years, for the support and maintenance of all the said children. Should either one or more die before the attainment of twenty-two years, I also direct the share or shares of them so dying before the attainment of such age, to be equally divided among the survivors or survivor of them, the principal, with all interest due thereon, to be paid to them by my executors, as they shall severally attain the age of twenty-two years.

And all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, and of what nature, kind, or quality soever the same may consist, and not hereinbefore given, particularly devised, bequeathed, and disposed of, I do hereby give, devise, and

(*a*) The sentence is imperfect in the original.

bequeath equally unto and between all my said children, the said George Parsons, Elizabeth Hobbs, Nancy Wilcox, and my son John Parsons, or so many of them as may be then living at the time of my decease, their heirs, executors, administrators, and assigns, subject to the payment of the aforesaid legacies and debts" (*a*).

On the testator's death, the will was duly proved by his executors.

After the death of the testator's widow, the executors paid the dividends on the 3000*l.* and 5300*l.* to Mrs. Hobbs and Mrs. Nancy Wilcox; Mrs. Hobbs died in 1838, when her children claimed to have their shares of the said sums paid to them (those under twenty-two to be applied for their maintenance). The executors, in consequence of this demand, submitted a case to Mr. (now Lord Justice) Knight Bruce, for the purpose of taking his opinion, whether the gift to the children of Mrs. Hobbs was valid; Mr. Knight Bruce intimated that the question was not free from doubt, but that he thought the gift valid. A similar opinion was subsequently given by another gentleman at the bar.

The executors acted on these opinions, and paid some of the legacies. In November, 1838, the bill was filed by Mr. and Mrs. Wilcox against the executors, and prayed that the will might be established and the accounts taken. The executors put in their answer, and submitted the question to the decision of the Court. In 1847, a decree was pronounced, directing the usual inquiries. In 1841, Mrs. Nancy Wilcox died during the progress of the suit, and the executors continued to apply the income of the shares of the children for their maintenance. The Master allowed these payments.

Exceptions were taken by the administrator of Mrs. Hobbs, and the administratrix of Mrs. Nancy Wilcox, that the Master ought not to have allowed such payments. The exceptions now came on for argument.

(*a*) The above extract is given as the passage stands in the will.

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Mr. *Malins*, for the executors, submitted to the Court, whether the bequest to the children of Mrs. Hobbs and Mrs. Nancy Wilcox was valid.

*Argument.*

Mr. *Elmsly* and Mr. *Lewin* for the representative of Mrs. Hobbs. Unless the children of Mrs. Hobbs and Mrs. Wilcox took a vested interest at the date of the testator's death, the gift would necessarily be too remote, because the period would exceed twenty-one years after the death of the tenant for life.

It is not denied that there are sufficient words of gift to the children *on* attaining twenty-two; but, unless the will contains some other provision, it is clear the gift must fail. There is no valid disposition, unless it is to be found in the direction, that the income is to go to the children for their support and maintenance. The question, therefore, resolves itself to this—do these words confer a vested interest in the principal. There is no one of the numerous authorities on this subject that goes this length. [The VICE-CHANCELLOR.—I think you may assume, that, if the will contained no gift for maintenance, the gift would be void.] In *Leake* v. *Robinson* (*a*), it was laid down that where (as here) there is no gift but by a direction to transfer from and after a given event, the vesting must be postponed until that event has happened, unless a contrary intention is to be collected from the will. In *Batsford* v. *Kebbel* (*b*), the dividends of a sum of 500*l.* was given to the legatee, until he should attain the age of thirty-two, and then, on his attaining that age, the testator directed the trustees to transfer the principal; but it was held, that the legacy did not vest until the legatee had attained the prescribed age. In *Vawdrey* v. *Geddes* (*c*), the interest of residuary estate was given to certain persons for their lives, with a direction, that, on their death, the income was to

(*a*) 2 Mer. 387. (*b*) 3 Ves. 363. (*c*) 1 Russ. & My. 203.

be applied for the maintenance of their children until twenty-two, when they were to receive the principal; it was held, that no vested interest was given until that age, and that, consequently, the gift was void. It was almost impossible to distinguish that case from the present. In *Bull* v. *Pritchard* (*a*), certain personal estate was given to trustees, on trust to pay the dividends to the testator's daughter for her life, and after her decease to pay the principal unto all and every her children who should attain twenty-three, share and share alike, with benefit of survivorship; and in case any of them died under that age, with limitations over, in case there should be no such child or children, or, being such, all of them should die under twenty-three. It was held, that, inasmuch as the vesting might not take place till more than twenty-one years after a life in being, the limitations over were too remote. In *Boreham* v. *Bignall* (*b*), the same principle was maintained. In *The Marquis of Bute* v. *Harman* (*c*), in which a fund was given to a mother for her life, with remainder to her children who should attain twenty-five, with a gift for maintenance during their minority, it was held that the gift was clearly invalid (*d*).

The plain meaning of the testator was to make an allowance to the children for their maintenance, and, in the event of their attaining twenty-two, to give them the principal, which was clearly a contingent gift: *Ring* v. *Hardwick* (*e*), *Comport* v. *Austen* (*f*), *Blagrove* v. *Hancock* (*g*).

To hold that the gifts vested at the testator's death, would be to defeat the testator's intention; because, on attaining twenty-"one," if the gift were vested, each child might call upon the trustees to pay his legacy.

(*a*) 1 Russ. 213—218.

(*b*) 8 Hare, 131.

(*c*) 9 Beav. 320.

(*d*) There is an error in the report of this case in Mr. Beavan's 9th Volume, which is corrected in 16 Beav. 166: *for* validity *read* invalidity.

(*e*) 2 Beav. 352.

(*f*) 12 Sim. 218.

(*g*) 16 Sim. 371.

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Argument.

Mr. *Temple* and Mr. *Shebbeare*, for the representative of Mrs. Wilcox, cited *Southern* v. *Wollaston* (*a*).

Mr. *Bacon* and Mr. *Shapter*, for the representative of the widow, cited *Bland* v. *Williams* (*b*).

Mr. *Wigram* and Mr. *Bagshawe*, jun., appeared for the executors.

Mr. *Walker* and Mr. *W. D. Lewis*, for the children, were not called on by his Honour.

*Judgment.*

The VICE-CHANCELLOR:—

There is considerable obscurity in the language of the will, but, upon the whole, I am of opinion that the payment to the children of the legacies, and not the vesting, was intended to be postponed. The will is the composition of an illiterate testator, and the spelling and the language are inaccurate. What he has given in the first place to his two daughters and their children, are shares of certain copyhold property, and shares in a sum of 3000*l.* in his residuary estate; and in making this gift he says, that "my executors shall receive the dividends and interest thereof, apply and pay the same to my two daughters Elizabeth Hobbs and Nancy Wilcox, for their lives." It is evident he there intends to deal only with the shares, to the extent of his daughters' life estates. Having explained this, he proceeds to say what is to be done with the capital. His words are, "and from and after their decease, to go to their children." It is reasonably plain, the testator is here dealing with both principal and interest after the death of his daughters. It is said, indeed, that the testator means only the income; but I cannot see any ground for confining the direction to the income, which would naturally extend to both capital and income. I think the

(*a*) 16 Beav. 166. (*b*) 3 My. & K. 411.

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subsequent direction makes the testator's meaning more clear; he says, if any child shall die under the age of twenty-two, the share or shares of either of them shall be equally divided among the survivor or survivors." What share? Clearly not the share of the dividends, because no direction was necessary to effect that object. I think it is plain the testator was here speaking of the share of the principal, which he directed to go to the survivors. If there were more doubt of the meaning than appears to exist in this case, the Court would be bound to favour that construction which gives to the children, who are confessedly objects of the testator's bounty, a vested interest in the legacy. The devesting clause is void. The exceptions must, therefore, be overruled.

Hancklett v. Briscoe 22 Beav. 494

## BREWER *v.* SWIRLES.

*March* 18*th*.

A married woman, with an absolute power of appointment over property settled to her separate use, having, by her acts, induced the trustees to lend the fund on unauthorised security, so that it was lost, and conceiving herself unable to maintain a suit to charge the trustees for the loss, executed an appointment of the fund after it had been lost, in favour of her infant children, to enable them to file a bill to charge the trusteees: the Court dismissed the bill.

BY an indenture of settlement, dated the 11th of July, 1840, between J. D. Brewer and Sophia his wife of the one part, and Walter Reid and William Waite of the other part, which was duly acknowledged by Mr. Brewer under the Act, reciting that the wife under the will of one John Faulding was then entitled to one undivided fifth part of certain hereditaments directed by the will of the testator to be sold, subject to the life estate of the widow of the said testator, it was thereby witnessed that the said husband and wife did grant, bargain, sell, and confirm unto the said Walter Reid and William Waite, their heirs and assigns, all that share and interest in the said premises under the will of the said testator, subject to the said life estate, to hold the same to the use of the said Walter Reid and William Waite, their heirs and assigns, but upon

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trust, that the said Walter Reid and William Waite, or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor, should, at their discretion and as soon as conveniently may be, make sale, sell, and absolutely dispose of the said premises, and convey and assure the same when sold unto the purchaser or purchasers thereof, &c. &c.; and it was further declared and agreed by and between the said parties thereto, that the said Walter Reid and William Waite, and the survivor of them, his executors, administrators, and assigns, should stand and be possessed of the monies to arise or be produced from such sale or sales as aforesaid, upon the trusts following, that is to say—"Upon trust, at their or his discretion, to lay out and invest the same at interest in their or his names or name, either in or upon any of the trusts or funds of Great Britain, or upon real securities in England or Wales, and from time to time to vary and change the securities in or upon which the said trust moneys or any part thereof should be invested, either as occasion should require or as should be thought expedient or proper, and should stand and be possessed of as well the principal of the said trust moneys, stocks, funds, and securities, as the dividends, interest, and income thereof, upon trust for such person or persons, and for such ends, intents, and purposes, in such parts, shares, and proportions, and in such manner and form in all respects as she the said Sophia Brewer by any deed or deeds, instrument or instruments in writing, or by her last will and testament in writing, or any codicil or codicils thereto, should, as well when covert as sole, and notwithstanding her then present or any future coverture, direct or appoint; and in default thereof, and so far as any such direction or appointment (if incomplete) should not extend, upon trust that they the said Walter Reid and William Waite, or the survivor of them, his executors, administrators, and assigns, should, yearly and every year during the natural life of the said Sophia

Brewer, receive and take the dividends, interest, and income of the said trust moneys and the securities thereof, as and when the same respectively should become due, and pay the same dividends, interest, and income, when and as the same should be received by them or him, unto her the said Sophia Brewer for her sole use and benefit, separate and apart from and exclusive of the said J. D. Brewer, her present or any future husband, and so and in such manner that the same might not be under his control, or subject or liable to his debts, contracts, forfeiture, or engagements; and from and after the decease of the said Sophia Brewer, then should stand and be possessed of the said trust moneys, stocks, funds, and securities, and the dividends, interest, and income thereof, or so much and such part of the same respectively as should not have been otherwise disposed of according to the true intent and meaning of the now-stating indenture, or any appointment to be made in pursuance of the same, in trust for the person or persons who, at the time of the decease of the said Sophia Brewer, should be of the blood and of kin to her, and also, either in his, her, or their own right, or in the right of his, her, or their representative, would have been entitled to the same under the statutes made for the distribution of the effects of intestates, in case the said Sophia Brewer had died intestate and without being under coverture."

The trustees, in pursuance of the trusts of the said indenture, sold the share for 600*l.*

Walter Reid principally acted in the trust, and had the control of the trust moneys.

Some time prior to 1846, Walter Reid, having contracted to purchase shares in certain ships, in order to complete the purchase applied to Mrs. Brewer for permission to invest the trust moneys in such shares, to which she assented, (but no deed was executed in conformity with the settlement), and the fund was accordingly so applied. The

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investment turned out unfortunate, and the trust fund was ultimately lost. Walter Reid made his will on the 9th of July, 1846, of which he appointed the defendants Swirles and Arnold executors.

William Waite, the other trustee, had executed the various deeds, but being a seafaring man was frequently absent from England, and had never had possession of the trust moneys.

By a deed poll, dated the 22nd of December, 1851, duly executed under her hand and seal, Mrs. Brewer, in exercise of the power and authority given to her by the said indenture of the 11th of July, 1840, directed and appointed that the said trust moneys should be paid and transferred to Benjamin Motts and John Gardiner, upon trust to lay out and invest the same, and to stand possessed of such moneys, stocks, funds, and securities, upon trust for Eleanor Waite Brewer and Catherine Waite Brewer, and any children who might be born of the said Sophia Brewer by her then present or any future husband, in such shares or proportions as the said Sophia Brewer should by deed or will appoint.

On the 14th of January, 1852, Eleanor Waite Brewer and Catherine Waite Brewer, by their next friend James Moyse, filed the present bill against the surviving trustee and the executors of the deceased trustee, and prayed that an account might be taken of the proceeds of the said premises, and of the moneys which had been received by the said trustees or either of them, and that what might be found due might be paid by the executors of the deceased trustee and by the surviving trustee personally to the trustees of the said deed poll upon the trusts therein declared.

*Argument.*

Mr. *Bacon* and Mr. *J. V. Prior* for the plaintiffs.—It was clear that trustees could only deal with the trust fund in conformity with the powers contained in the settlement. In *Fowler* v. *Reynal* (*a*) the trustees took the security of

(*a*) 3 Mac. & G. 500.

two out of three persons to whom the trust moneys had been lent, and it was held a misapplication of the fund for which they were liable.

Then could the concurrence of the married woman, in dealing illegally with the trust moneys, relieve the trustees from the consequence. It was submitted it could not. In this case, Mrs. Brewer received no benefit from the breach of trust, though even had she been a gainer by the transaction that would not exempt the trustees from liability either to Mrs. Brewer herself or her appointees: *Kellaway* v. *Johnson* (*a*). It was clear, on the authority of that case, that she could herself have maintained this bill.

The object of the settlement was to protect the wife against her own acts, influenced, as they must be, by her husband. Suppose the fund had been paid into her own hands, the trustees would be liable for a breach of trust. It was well settled that a married woman could not dispose of her property except in the mode recognised by the law, and the power of appointment did not extend her right except it was pursued strictly.

But whether Mrs. Brewer could herself maintain a suit against her trustees, it was clear that her appointees were not affected by her acts: *Kellaway* v. *Johnson* (*a*).

Here the plaintiffs, besides being appointees, would also come within the limitation in the settlement to the next of kin of the wife, and were entitled in that capacity to the relief sought by this bill: *Hopkins* v. *Myall* (*b*).

Mr. *Batten* appeared for the trustee Waite, and submitted, that the estate of the acting trustee was primarily liable to make good the loss occasioned by the breach of trust.

Mr. *Elmsly* and Mr. *Cairns* appeared for the other trustee, but were not called on by his Honour.

(*a*) 5 Beav. 319. (*b*) 2 Russ. & My. 86.

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*Judgment.*

The VICE-CHANCELLOR:—

In my opinion this suit is not maintainable. The bill is filed by the infant children of Mrs. Brewer as the appointees under a power contained in a post-nuptial settlement, by which certain property accruing to the husband in the right of his wife was settled for the exclusive use of the wife.

The whole scope of the settlement is to give the property for the exclusive benefit of the wife, and the recital is to that effect. There is, however, an absolute power reserved to Mrs. Brewer to appoint the property to any person she pleases, to her husband or to a stranger. No doubt there is a trust for her own separate use, but that is accompanied by the absolute power to which I have referred, by virtue of which she might give the property, in strict conformity with the settlement, to a mere stranger.

It is said, however, that she was under the disability of coverture. But so far as regards this property, she was in fact a feme sole, and must be so regarded by this Court.

Such being the nature of the settlement, Mrs. Brewer has so dealt with the property, that, in the event that has happened, it has been lost. It is true she has not followed strictly the method prescribed in the settlement (if she had, there could not be a pretence for this bill); but having absolute power to deal with the property she has availed herself of that right, though in an informal manner. I do not think, however, the mere informality would be sufficient to justify this Court in relieving her against her own act. I think, if this were a bill by Mrs. Brewer herself, complaining of her own acts, it could not be maintained. The disability of a married woman has never been extended so far in a Court of equity.

Mrs. Brewer, being under the impression, which I think a right impression, that by her own conduct she could not maintain a suit to make the trustees liable, did not venture herself to become the plaintiff; but, on the 24th

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of December, 1851, shortly before the filing of the bill, she exercised the power of appointment contained in the settlement in favour of her infant children, the present plaintiffs, and by the terms of the deed she deals with the settled property as still existing, whereas at that time it had been lost by reason of an act authorised by herself.

Under these circumstances, I am of opinion that Mrs. Brewer could not herself maintain the suit. I think the same disability attaches to her appointees; and I shall therefore dismiss the bill, but, considering the peculiarity of the case, without costs.

*Re Baglehurst*, 21 Beav. 430.

## DRYSDALE *v.* MACE.

*Feb.* 10*th.*

Conditions upon the sale of a reversion subject to a life estate referred to a deed containing a recital, that an annuity was charged on the reversion, but alleged that the annuity had not been claimed for twenty years, and provided that a recital in a deed, dated in 1841, that it had not been claimed for eight years, should be conclusive evidence that the annuity had determined. Upon inquiry, the purchaser ascertained that the annuity was still subsisting:—*Held*, that the representation was calculated to prevent the inquiry on which the notice of the deed might have put the purchaser; and the vendor's bill for specific performance was dismissed.

THIS was a suit instituted by a vendor, by claim, to enforce the specific performance of an agreement for the purchase by the defendant of a reversionary freehold estate.

In the printed particulars of sale the property was thus described: "A valuable reversion of freehold property, producing about 118*l.* per annum, at the death of a lady now in her 71st year, arising from three freehold houses, being Nos. 30, 31, and 32, on the east side of Trinity-square, Great Tower-hill, one thereof being the well-known George Tavern."

An auction was held for sale of the property on the 21st of February, 1853, but the property was not then sold.

The defendant, Mr. Mace, early in May, 1853, entered into a negotiation with the auctioneer for the purchase of the property by private contract, and offered 850*l.* for the pro-

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perty. The auctioneer then gave Mr. Mace a printed copy of the particulars and conditions of sale, and recommended him to take the opinion of his solicitor on them before he bought.

Among the conditions of sale was the 9th. The question in this suit arose on the part of that condition which was in the following terms:—

"That the statement in a deed of the 21st of December, 1839, that a life annuity of 36*l.*, granted to George Morris in April, 1824, had not been paid or claimed for eight years previously, and which will be supported by a declaration by the vendor that no claim has been made on him since the decease of his testator in 1841, and that he believes the same has not been claimed for the last twenty years, shall be conclusive evidence of the fact of such annuity having determined, and of the cesser of the term limited for securing the same."

On the 11th of May, 1853, Mr. Mace called on the auctioneer, and renewed his offer of 850*l.* for the property; but the auctioneer said the property was worth more. Mr. Mace then directed the auctioneer's attention to the annuity mentioned in the conditions, saying, there is an annuity on the property, and it is unsatisfactory, and this lessens the value. The auctioneer, in reply, said, make a calculation of how much the annuity is worth, as though you had to pay it all, and then the property will be worth more than you are offering, and added, "Buy the property as if you were to pay the annuity, and then you cannot do wrong; for I do not understand how it is, and therefore cannot tell you any more than is in the particulars of sale." Mr. Mace then agreed to become the purchaser of the property at the sum of 850*l.*, if Mr. Drysdale would accept that sum.

Mr. Mace called again on the 11th of May on the auctioneer, and the plaintiff having consented to sell at the

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price of 850*l.*, Mr. Mace signed an agreement, whereby he admitted that he had that day purchased, by private contract, the reversion comprised in the particulars, at the sum of 850*l.* (on which he had paid 100*l.* as a deposit), subject to fulfilling, on his part, the conditions of sale.

By the abstract of the title to the property, it appeared, that, by an indenture, dated the 8th of April, 1824, made between Edward Hampton Noy of the first part, Matthew Hercules Sheppard of the second part, George Morris of the third part, and Edward Bridger of the fourth part, Edward Hampton Noy, the then owner of the reversionary estate contracted to be sold to Mr. Mace, and Matthew Hercules Sheppard as his surety, covenanted to pay to one George Morris an annuity of 36*l.*, for the lives, at the times, and in the manner therein mentioned; and Edward Hampton Noy, by the direction of George Morris, granted and demised to the said Edward Bridger the freehold estate therein described (being the hereditaments contracted to be sold to Mr. Mace), for the term of 500 years, (subject to a use or trust created by the will of William Hampton, for the benefit of Mary Elizabeth Noy and Sarah Johns, during their respective lives and the life of the survivor of them; and also to the rights and interests of Mary Ann Maria Noy and Sarah Elizabeth Noy, therein named, given and devised to them by the will and codicil of the said William Hampton), upon trust, in case the said annuity of 36*l.* should be in arrear for one calendar month, that the said Edward Bridger should sell the property, and thereby pay and secure the annuity.

The counsel for Mr. Mace advised that the term and trust for securing the above annuity were both subsisting, and might and would probably be enforced by the annuitant upon the death of the tenant for life; and that the title shewn was not such as the conditions of sale obliged the purchaser to accept. The purchaser's solicitor sent to

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the vendor's solicitors a copy of this opinion, with a letter, informing them that he should be obliged to relinquish the purchase, in consequence of the defective state of the title. The vendor's solicitors declined to cancel the agreement, and sent to the purchaser's solicitor answers to the objections to the title, but which did not remove such objections.

*Statement.*

After giving notice to Mr. Drysdale's solicitors of his intention to make inquiries as to the annuity from Mr. Morris or his personal representatives, to which no objection was made, Mr. Mace's solicitor ascertained from Mr. Morris's executors, that the annuity had been granted during the lives of four persons and the life of the survivor of them, and that one at least of those four persons was still living; and that the annuity was still subsisting, though the same had been permitted to run into arrear, in consequence of the supposed inability of the grantor and his surety to pay the same.

*Argument.*

Mr. *Malins* and Mr. *Stevens* for the plaintiff.—The plaintiff is entitled to the specific performance, by the defendant, of this agreement. The sale was not one by public auction, as to which, it is said, that the conditions are to be read strongest against the vendor. Here, although the terms of the contract are the conditions of sale, the sale was by private contract, and the conditions were, at the express desire of the auctioneer, submitted to the consideration of the defendant's solicitor before he signed them, and were accepted after deliberation, and after express reference to and discussion of the doubt and difficulty as to the existence of the annuity. The principles applicable to a sale at auction are not applicable to this case, where the purchaser has accepted the terms after ample deliberation.

The ninth condition gave the purchaser notice of the

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deed under which the annuity had existed, and this was notice to him of all its contents. Thus, in *Hall* v. *Smith* (*a*), notice of a lease bound the purchaser to its contents, even against the vendor's statements, and the purchaser was held to have had such constructive notice of the contents, as that he could not rescind the contract on the ground of the erroneous statement as to them. On the same principle (no question of fraud having been suggested) this purchaser having notice of the deed, it was his duty to have examined it, and not to have misled the vendor into entering into a contract on which the vendor relied, as making certain evidence to be conclusive between them in respect to the difficulty to which the condition pointed.

*Argument.*

The purchaser had no right, against the terms of the condition making certain evidence conclusive against him, to raise, by his inquiries, a latent claim, which otherwise never would have been made, and, having thus excited the vigilance of the annuitant, to leave the property on the vendor's hands diminished in value.

Mr. *Bacon* and Mr. *Younge*, for the defendant, were not heard.

The VICE-CHANCELLOR:—

*Judgment.*

The conduct of the parties ought to weigh with the Court in exercising the discretionary jurisdiction of specific performance. If the Court finds anything on the part of the vendor which amounts to unfairness, or a want of fairness, this Court will not interfere on his behalf.

In this case, the vendor made a representation to the public, which was not a full and fair representation, but was calculated to make a purchaser believe that the risk

(*a*) 14 Ves. 426.

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of the annuity being claimed from the property was less than it was. The representation disarmed inquiry.

The fact of the annuity not having been claimed for twenty-one years, is important as presumptive evidence that it had been determined. But it ceases to be important when it is ascertained that the annuity was not payable till after the death of the tenant for life. The representation in the conditions of sale conveys the impression that the annuity was payable during the lifetime of the tenant for life. It was a representation calculated to mislead, and which did not fairly put the risk before the purchaser.

As to the argument raised on *Hall* v. *Smith*, that, the deed being mentioned, the purchaser had constructive notice of its contents, it cannot apply to a case in which an express representation is made to the purchaser, on which he may rely, and which turns out not to be a fair representation (*a*).

(*a*) See *Fenton* v. *Brown*, 14 Ves. 144; *Robinson* v. *Wall*, 10 Beav. 61; *Southby* v. *Hutt*, 2 My. & Cr. 207; *Nelthorpe* v. *Holgate*, 1 Coll. 203; *Seaton* v. *Mapp*, 2 Coll. 556; *Shackleton* v. *Sutcliffe*, 1 De G. & S. 609.

1 Phil. 5 De Gex Sm & G. 103 -

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## FARRAR *v.* BARRACLOUGH.

*Feb.* 11*th.*

THE plaintiffs in this suit were Mr. Edward Farrar and Ann Eliza his wife, in right of the wife as sole residuary legatee of her father, a testator named Hebden. The defendant was Mr. William Barraclough, the trustee and executor under the testator's will.

The suit sought the administration of the testator's estate, and to charge the trustee with a sum of 600*l.*, which had been invested in a security unauthorised by the testator's will.

The testator Mr. Richard Hebden, by his will, dated the 12th of April, 1817, gave, devised, and bequeathed his real and personal estates unto the defendant Mr. W. Barraclough and another trustee long since deceased, upon trust to permit and suffer his wife Abigail to have the use and enjoyment thereof, to convert his stock in trade and all the residue of his personal estate into money, and to place out at interest on some good security or securities the whole of his personal estate (except the household goods and furniture), and from time to time to pay the interest arising therefrom, when and as the same should be received, together with the rents and profits of all his real estates unto his wife during her natural life, for her own support and the maintenance and education of his daughter Ann Eliza, in case she should so long remain unmarried, but not otherwise. And the testator declared, that, in case his daughter should happen to get married during the life of his wife, it was his will and mind, and he thereby directed, that his trustees should thenceforth pay unto his wife, during so long time as she should remain unmarried, the

A widow, a tenant for life, desiring an increase of income, induced a trustee to invest, out of a trust fund, a sum exceeding two-thirds of its value on mortgage of copyhold house property at interest at 5*l.* per cent. After the rents had become insufficient to pay the interest, her daughter, on her marriage, became entitled to one fourth of the trust fund. The trustee having stated to the husband and wife the deficiency in the widow's income and its cause, they accepted a small sum of money in hand in lieu of their one fourth, and made no objection for ten years, when the widow died. Becoming then entitled to the remaining three-fourth parts of the fund, they sought by suit to charge the trustee with the deficiency:—*Held*, that they had so far acquiesced in the investment, and could not complain of it.

It is not a breach of trust for a trustee to take a mortgage not containing a power of sale.

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*Statement.*

rents, interests, and produce of three-fourth parts only of his real and personal estates; and if his daughter should happen to get married during the life of his wife, then he declared that his trustees should, at the expiration of six months from the time of such event, by and out of his personal estate, pay unto his said daughter such sum of money as would be equal in value to one-fourth part of his real and personal estates; and when and so soon as his wife should happen to die or marry again, then he directed that his trustees should convey the whole of his real estates, and assign or pay such part of his personal estate as should not have been previously disposed of, unto his daughter for her own use absolutely, if she should then be living, with other limitations over in certain events which have not happened.

The testator died in May, 1817, and the defendant Mr. Barraclough and his co-trustee, who were also the executors, proved the will in the proper Ecclesiastical Court.

The co-trustee died many years ago, having first duly accounted to Mr. Barraclough in respect of the testator's estate.

The plaintiff Mr. Edward Farrar married the testator's daughter on the 14th of September, 1838.

The testator's widow did not marry again, and died in the month of November, 1849.

Mr. Barraclough in the month of November, 1829, lent 600*l.*, part of the testator's personal estate, to one Henry Sutcliffe, upon the security of ten copyhold cottages held of the manor of Wakefield, which were surrendered to the defendant by way of mortgage, but without any power of sale. The 600*l.* remained due on the security, together with considerable arrears of interest thereon.

Mr. and Mrs. Farrar filed their bill against Mr. Barraclough, stating the above facts and circumstances; charging, that the security on which the 600*l.* had been invested was very inadequate, and that the rents of the ten cottages

had for some time past been insufficient to keep down the interest of the principal sum; and praying for the usual accounts of the real and personal estate of the testator possessed by the defendant; and that the residue might be paid and assured to the plaintiffs; and that the defendant might, if necessary, be decreed to make good the 600*l.* and interest at 4*l.* per cent. per annum, or so much thereof as the security should be insufficient to satisfy.

It appeared in evidence that the money had been advanced in 1829, at the request of the testator's widow, who proposed the security to the defendant; and that the defendant was in part induced to lend the amount, in order to obtain the high rate of interest of 5*l.* per cent. for the testator's widow, whose income was small. The property consisted of ten cottages, occupied by weavers, at a gross annual rental of 47*l.*, and their value was estimated at 890*l.* The work of the weavers had been superseded by the introduction of steam power, and the value of the property had consequently deteriorated; the mortgagor had become unable to pay the interest, and about ten years since the property had been unsuccessfully offered for sale by him; after that time it had been in the defendant's possession, but the rents were very inadequate to keep down the interest.

On the marriage of the plaintiffs the defendant paid to the plaintiff Farrar 99*l.* 14*s.*, a sum then in hand, in lieu of the one-fourth share of the testator's estate given to Mrs. Farrar on her marriage by the testator; and thereupon Mr. and Mrs. Farrar gave a receipt as in part of money due under the will. The defendant alleged by his answer, and by his own deposition in support of his case, that on that occasion he informed Mr. Farrar of the mortgage, and that the interest was in arrear, as a reason why he should not insist on receiving the full one-fourth of the property to which, by the terms of the will, Mrs. Farrar had become entitled on her marriage. The plaintiff, how-

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ever, deposed, that, since the marriage, and since he had become acquainted with the nature of the security, he had expressed his entire dissatisfaction with it; and that he had neither adopted nor acquiesced in it.

*Statement.*

It was in evidence in the case, that, after the death of Mrs. Hebden, the widow, the plaintiff Mr. Farrar had been willing to accept a transfer of the property, on the mortgagor concurring and releasing the equity of redemption; but that the transfer was not completed in consequence of the death of the mortgagor.

Subsequently the plaintiffs required the trustee to make good the deficiency on the security.

*Argument.*

Mr. *Malins* and Mr. *J. T. Humphry* for the plaintiffs.—The investment, at the time it was made, was improvident; the utmost amount which any surveyor will even now venture to state to have been the value of the property was 890*l.*, and it must be assumed not to have been of a value at all equal to that sum; 600*l.* was advanced on it. Now, according to Lord *Cottenham's* opinion in *Stickney* v. *Sewell* (*a*), two-thirds of the valuation is the utmost amount which it is justifiable to advance on freehold security; but in this case the security not being freehold, the value must be taken to have been greatly inadequate at the time; and the kind of property, small cottages, was not suitable for an investment of trust funds. Acquiescence by the plaintiffs since the marriage is suggested as a defence; that is entirely denied, and it does not appear that the plaintiffs knew of the nature or character of the security, so as to bind the plaintiffs by any acquiescence.

Mr. *Bacon* and Mr. *G. L. Russell*, for the defendant, submitted that the value was adequate when the advance was made; that a surplus of 290*l.* afforded reasonable mar-

(*a*) 1 My. & Cr. 15.

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gin enough to entitle the trustee to say the security was sufficient; that the trustee had not relied on the precise value, but had been advised by a competent surveyor that the security was sufficient, and that he was absolved from responsibility.

*Argument.*

They also contended that the conduct of Mr. and Mrs. Farrar, acquiescing during the life of Mrs. Hebden, deprived the trustee of the remedy he would have had to impound her income to make good any deficiency in the proceeds of the security, and was an acquiescence which destroyed any equity which the plaintiffs might otherwise have had.

Mr. *Malins* in reply.

The VICE-CHANCELLOR said:—

*Judgment.*

The rule of this Court, which regulates the conduct of trustees in the investment of trust funds, is of very great importance. Lord *Cottenham* has stated it very clearly in *Stickney* v. *Sewell* (*a*), where he says, "To advance two-thirds is admitted to be within the rule of ordinary prudence; but that is with reference to property of a permanent value, as freehold land. The same rule does not apply to property in houses, which fluctuates in value, and is always deteriorating." In ordinary cases of investment by trustees, where the value of freehold property is estimated at less than two-thirds of the money lent, the investment is, according to the rule of this Court, improvident. On the other hand, the conduct on the part of those who are interested in the investment may be such as to preclude their right to complain of the conduct of the trustees, if the security should turn out insufficient. Thus, if a tenant for life is aware that the money advanced upon

(*a*) 1 My. & Cr. 8, 15.

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property is more than two-thirds of its value, in order that 5*l.* per cent. for the money might be received, the cestui que trusts in remainder, also acquiescing, are not entitled to complain of the conduct of the trustees.

In this case, the widow, the tenant for life, wished to get a larger income for herself, and the interest upon this security was 5*l.* per cent. The investment was made in 1829 with her concurrence, and the money has since that time continued on the same security, without any request ever having been made on the part of any person interested that it should be called in.

The plaintiff, Mr. Farrar, in right of his wife, became, on his marriage in 1839, entitled to one fourth part of the trust fund; and on that occasion the trustees explained to him the nature of the investment, and that it had been made in order to secure 5*l.* per cent.

In 1849 the widow, the tenant for life, died, and the property thereupon accrued in possession. The plaintiffs were aware of this investment, and that the property had become depreciated in value; and yet it appears that even then the plaintiff, Mr. Farrar, was willing, upon obtaining a release of the equity of redemption, to take the property in satisfaction of his claim. That arrangement was intercepted only by the death of the owner of the equity of redemption.

I must, under these circumstances, hold that the plaintiffs had full knowledge of this investment, and that the security had been taken in order to procure for the tenant for life the largest interest possible.

The bill does not allege that the property was of insufficient value in 1829, but it states that the rents of the cottages upon which the money was advanced have not kept down the interest. The plaintiffs do not say that that fact came upon them by surprise, and there is nothing else to charge the defendant with breach of trust.

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An attempt has also been made to charge, as a breach of trust, that the defendant took the mortgage without having had given to him a power of sale; but I never heard that that amounted to a breach of trust. If such a breach of trust be the sole object of this suit it is not sustainable on that ground.

*Minute of Decree.*

Declare that the defendant is not chargeable with the deficiency which has arisen upon this security; and the defendant, undertaking to realise the security, by claim or otherwise as he may be advised, order the usual account, limiting the account of income as from the death of the widow, and stay further proceedings, with liberty to apply.

## MARSHALL *v.* BREMNER.

*March 8th.*

JOHN BREMNER, by his will, dated the 15th of July, 1828, after appointing executors, desired them to sell or dispose, as they might think proper, of his business and lease of the house in Piccadilly, and, if sold, to place the money in the funds, together with all debts due to him as soon as collected, for the benefit of his wife and children; and he desired his executors to pay to her, as often as they became due, all rents, dividends, or funded property, and all other rents or interest to which he was entitled or might become entitled, for her use, and for educating, supplying, and bringing up all his children, which he then had or might have by her; and at her death all the residue and remainder of his estate to be equally divided among his surviving children that had attained the age of twenty-

A testator desired his executors to sell, as they might think proper, his business and lease of his house; and to place the money in the funds; and to pay to his wife all rents, dividends, or funded property, and all other rents or interest to which he was entitled, for her use, and for bringing up all his children; and, at her death, all the residue of his estate to be equally divided among his children. The executors were authorised to advance to any child his portion, at his wife's approbation, but not to decrease her income below 100*l.* per annum:—*Held*, that there was no trust for conversion.

The question against the widow was raised by claim, which involved a litigation extending over four years; the same question might have been raised by bill and demurrer. The Court, holding the costs to have been improperly incurred, refused the plaintiff his costs.

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one years, or his daughters on their marriage, the others to receive their shares as they respectively arrive at that age of twenty-one years; and if it should appear to his executors that it would benefit any of his children to advance the portion they would be entitled to at their mother's decease, and it should meet her approbation, he desired them to do so, but on no account to reduce her income below 100*l.* per annum if unmarried; and in case his wife should again marry, he desired his executors to pay to her the whole of the above-named rents, dividends, and interests, as long as they were satisfied that his children were properly provided for and taken care of; and if they were not, he desired his executors to provide for them out of his estate, and to retain a sum of money to pay to his wife personally, notwithstanding her coverture, the sum of 40*l.* per annum, the principal to be equally divided among his surviving children at her death, with the rest of his property; and he desired his executors to divide in manner as before directed in case of the death of his wife, that is, on their respectively arriving at the age of twenty-one years, or daughters on their marriage.

On the testator's death, the executors having disclaimed probate, administration with the will annexed was granted to the testator's widow.

The principal part of the testator's estate consisted of leasehold houses held for short terms of years. One of these leasehold houses was the house in Piccadilly, held for a term of which only fifteen years remained. The administratrix carried on her husband's business therein for her own benefit. There were other leasehold premises unsold of which the administratrix received the rents. All these leaseholds were rapidly decreasing in value.

There were ten children, and the widow maintained and educated them all until each attained majority.

Mr. John Bremner, one of these children, having become an insolvent debtor, Mr. Marshall, the creditors' assignee, and Mr. Sturgis, the provisional assignee under his

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insolvency, obtained from the widow as the administratrix with the will of the testator annexed, by proceedings against her in the Insolvent Court, an account of the assets. They then filed this claim against her and all parties interested under the will, stating that William Bremner was one of the residuary legatees under his father's will and codicil, and claiming the administration of the estate under the decree of the Court.

*Statement.*

The claim came on to be heard before the Vice-Chancellor *Knight Bruce* in January, 1851, when the cause stood over to enable the administratrix to render an account to the plaintiffs. The account was rendered accordingly; but the plaintiffs, not being satisfied, proceeded with the suit, and on the 28th of May, 1851, the Court made a decree directing the usual inquiries and accounts to be made and taken. The Master having made his report the cause now came on for further directions.

*Argument.*

Mr. *Cox*, for the plaintiffs, submitted that, under the terms of the testator's will, the immediate sale and conversion of all the testator's assets, including his trade, were directed; and that the widow had no right to the enjoyment of the assets in specie; and that the accounts must be taken against her upon that footing. This is the rule as laid down in *Howe* v. *Lord Dartmouth* (*a*).—He also cited *Prendergast* v. *Prendergast* (*b*), distinguishing the present case from that.

Mr. *Baily* and Mr. *Elderton*, for the administratrix, said, the testator did not direct a conversion; but the whole scheme of the will rather contemplated the enjoyment of the assets in specie. The will vested a discretion in the trustees to continue the assets in the investments in which they found them; and where that discretion was not exercised, the Court would not exercise the discretion by converting them; and on this point they relied on *Prendergast* v. *Prendergast* (*b*).

(*a*) 7 Ves. 137. (*b*) 3 H. L. Cas. 195.

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Mr. *Amphlett* appeared for the children.

*Judgment.*

The VICE-CHANCELLOR:—

I have no doubt as to the question of converson raised in this case. By this will the testator has expressed his intention that the widow should enjoy the income of his property in specie. He directs his executors to pay to his widow as often as they become due all "rents;" and he meant this for a very laudable purpose, that, during her life, she should have the means of bringing up all the children. He says, subsequently, that her income is not to be reduced below 100*l.* a year, even with her consent. On the construction of the whole of this will I am of opinion that the testator intended that there should be no conversion.

The rule applicable to this case will be found in *Lord* v. *Godfrey* (*a*), where the principle is very succinctly laid down, as most propositions by Sir John *Leach* are stated. That is a precedent to be followed in the present case.

In this case, the plaintiffs, being assignees of an insolvent, took proceedings in the Insolvent Court; and if the matter had rested there it would have been better for all parties. The plaintiffs were entitled to raise the question in this Court: there might have been a bill, and upon a demurrer the question might have been decided; but the plaintiffs have filed a claim upon which it could not be decided except upon the cause being brought to a hearing. After four years of litigation the question comes before me upon the Master's report; and now there is no case made for the suit. The plaintiffs ought not to be allowed to saddle those who have the conduct of the matter with the costs of this expensive proceeding.

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*Minute of Order.*

Declare, that there is no trust for conversion. The plaintiffs to pay their own costs, those of the defendants to be paid out of the estate, all further proceedings to be stayed.

(*a*) 4 Madd. 455—459.

## CRADOCK *v.* OWEN.

*March 8th.*

A testatrix, by will in 1841, gave to two devisees, who were also her executors, all her real and personal estate, upon trust for sale, and she gave out of the produce of her real and personal estate 50*l.* to each executor for his trouble, and other pecuniary legacies. There was no gift of the residue; and, after payment of debts and legacies, a surplus remained. The testatrix left no heir-at-law or next of kin.

The Court apportioned the legacies and costs of the suit between the proceeds of the real and personal estate, and the Crown was declared to be entitled to the surplus of the personal estate.

Where there was error apparent in the decree and the

MISS JANE WAKELIN COURTNEY, by her will, dated the 12th of February, 1841, appointed the plaintiff, Mr. Henry Cradock, and the defendant, Mr. Thomas Ellis Owen, her executors; and, after giving a small pecuniary legacy of 19*l.* 19*s.* to a charity, she gave, devised, and bequeathed unto the said Henry Cradock and Thomas Ellis Owen, their heirs, executors, and administrators, all her real and personal estate, upon trust to convert the whole into money. The testatrix then proceeded as follows:—"And I direct that Mr. Henry Cradock and Mr. Thomas Ellis Owen shall each retain out of the produce of my real and personal estate the sum of 50*l.* for his trouble in the execution of this my will and the trusts thereof, and I give and dispose of the residue of the produce of my real and personal estate as follows:"—Certain legacies to legatees by name were here enumerated, to the amount of 900*l.* The testatrix made no other disposition of her real or personal estate.

The testatrix died in August, 1847.

Mr. Cradock, on the 9th of July, 1851, filed his claim against Mr. Owen; and after referring to the trusts and disposition of the will, and stating that the real and personal estate of the testatrix had been sold and converted into money, and that all the legacies given by her will had been paid, and that the executors were willing to account for the proceeds of the estate and to have the estate administered; but that they were unable to discover who was the heir-

clerk's certificate, by directing payments out of personal estate instead of apportionment between real and personal estate, the Court altered and corrected the decree and certificate without a rehearing, notwithstanding the 15 & 16 Vict. c. 80, s. 34, and the 51st of the Orders of the 16th of October, 1852

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at-law or next of kin of the testatrix, or who were interested in the real and personal estate of the testatrix. The plaintiff claimed to have the estate administered in Court, in the presence of Mr. Owen the defendant, and such other persons as the Court should direct.

By the decree made at the hearing in July, 1851, the Court referred it to the Master to inquire who was heir-at-law, and who were the next of kin of the testatrix, and in their presence to take the usual accounts of the testatrix's real and personal estate. In pursuance of leave given to them by the decree the executors paid into Court to the credit of the cause 356*l.* 15*s.* 6*d.* to "the account of the personal estate," and 245*l.* 10*s.* 6*d.* to "the real estate account."

The Master by his report found that no person had come in before him to prove or claim as heir-at-law or next of kin, and stated that therefore he did not take the accounts.

By an order made on further directions, dated the 26th of January, 1853, the cause was referred to Chambers for the usual inquiries as to whether the testatrix left any heir-at-law or next of kin living at her death; and it was ordered that notice of such inquiries should be given to her Majesty's Attorney-General.

The Attorney-General attended the inquiries before the Chief Clerk at Chambers, who certified that he did not find that there was any heir-at-law or any next of kin of the testatrix living at her death.

The cause having come on upon this certificate for further consideration on the 30th of June, 1853, in the absence of the Attorney-General, the usual accounts of the real and personal estate of the testatrix were directed to be taken in the presence of the Attorney-General; and among other things, it was ordered that the testatrix's personal estate not specifically bequeathed should be ap-

plied in payment of her debts and funeral expenses in a due course of administration, and then in payment of her legacies; and further inquiries were directed to be made.

*Statement.*

The Chief Clerk, by his certificate dated the 19th of December, 1853, certified that he had taken the accounts and made the inquiries in the presence of the Attorney-General, and that "all the pecuniary legacies given by the testatrix's will, which were payable at her death, had been paid and had been allowed in the said account of personal estate."

The cause now came on again upon the certificate of the Chief Clerk for further consideration.

The only questions raised were, first, whether the Crown was entitled to the residue of the personal estate; and secondly, it being admitted that the Crown was not entitled to the real estate devised or its proceeds, whether, notwithstanding the direction in the order on further consideration of the 30th of June, 1853, for the payment of the debts and legacies out of the personal estate, made at a hearing at which the Attorney-General did not appear, the Court should now direct that the debts and legacies (other than the small legacy of 19*l.* 19*s.* to the charity, which had been paid out of and charged exclusively to the personal estate,) should be apportioned rateably between the real and personal estates in augmentation of the residuary personal estate.

*Argument.*

Mr. *Selwyn* for the plaintiff.—The devisees and executors are entitled to the proceeds of the real estate, subject to the question of apportionment of the debts, legacies, and costs of suit: this is conceded.

They are also entitled to the whole proceeds of the personal estate undisposed of by the will, to the exclusion of the Crown. Prior to the 11 Geo. 4 & 1 Will 4, c. 40,

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the executors would have been entitled to retain it even against the next of kin; but that statute constituted the executors trustees of the undisposed of residue for the next of kin of the testator. That statute was, however, confined to the next of kin, and did not alter the rights of the executors as against the Crown in case of undisposed of residue of a testator who left no next of kin. Thus, it was held, even in the case of an administrator to a person who died without leaving any next of kin, that the Crown had no title against the administrator: *Hawkins* v. *Hawkins* (*a*).

But if the Court should hold that the Crown is entitled to the residuary personal estate undisposed of by the will, it ought exclusively to pay the debts and legacies, and the costs of suit. Thus, in *Boughton* v. *James* (*b*), where a mixed fund was created out of the proceeds of real and personal estate, it was held that the personal estate was the primary fund to pay legacies and annuities, on the ground that there was no direction to discharge the personal estate from its ordinary primary obligation. The same reason exists here, and, therefore, the same rule should apply. Moreover, the right of the Crown to any apportionment in aid of the personal estate of the charges on the proceeds of the real and personal estate, was concluded by the decree which directed the legacies to be paid out of the personal estate, and the certificate of the Chief Clerk that they had been paid thereout accordingly, and that such payments had been allowed to the executors in their accounts.

Mr. *Cox*, for the defendant Owen in the same interest.

Mr. *Wickens*, for the Attorney-General.—It is conceded

(*a*) 7 Sim. 173. (*b*) 1 H. L. Cas. 406.

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that the Crown is not entitled to the proceeds of the real estate after it has been charged with its due proportion of the debts, legacies, and costs: *Burgess* v. *Wheate* (*a*), and other cases, including *Taylor* v. *Haygarth* (*b*). But, on the authority of this last case, the Crown is entitled to the personalty. This also appears from *Middleton* v. *Spicer* (*c*), where Lord *Thurlow* says, "The executors being excluded, and no relations to be found, I consider the executors as much trustees for the Crown as they would have been for any of the next of kin, if these could have been discovered." *Taylor* v. *Haygarth* was followed in *Ellcock* v. *Mapp* (*d*).

But the gift of the 50*l.* to each executor for his pains and trouble effectually excluded the presumption that they were to take anything more under the will. It follows that the Crown is entitled.

The Crown is entitled to have the legacies (except the legacy of 19*l.* 19*s.*) paid rateably out of the proceeds of the real estate, to the surplus of which the executors as devisees are entitled, in exoneration to that extent of the residuary personal estate.

The will gave all the real and personal estate upon trust to sell and convert the whole into money; and the money thus arising was formed into a mixed fund, out of which the legacies, except that of 19*l.* 19*s.*, which was payable out of the personalty, were directed to be paid. The legacies and the costs of the suit should, therefore, be apportioned between the proceeds of the real and personal property: *Roberts* v. *Walker* (*e*), which is a leading case on this point. *Broughton* v. *James* (*f*) does not apply to the present case, for in that case there was no trust to sell the real estate and convert it.

(*a*) 1 Eden, 189.
(*b*) 14 Sim. 8.
(*c*) 1 Bro. C. C. 201.
(*d*) 3 H. L. Cas 492.
(*e*) 1 Russ. & My. 752.
(*f*) 1 H. L. Cas. 406.

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*Argument.*

The direction given by the Court to pay the debts and legacies out of the personal estate, and the subsequent certificate of the Chief Clerk that he had allowed such payments to the executors accordingly, cannot be binding on the Crown, since the Attorney-General was not present when the order was made, and he appears in Court to-day for the first time.

Mr. *Cox* (in the absence of Mr. *Selwyn*) replied.—He submitted that the certificate of the Chief Clerk, having been filed eight days without any application made to vary or discharge it, was conclusive on the Crown under the 15 & 16 Vict. c. 80, s. 34, and the 51st of the Orders of the 16th of October, 1852.

*Judgment.*

The VICE-CHANCELLOR:—

The first question is, as to the right of the Crown to the surplus of the personal estate. That right is perfectly clear, if, by the terms of the will, the executors are excluded. There is a gift to the executors for their care and pains in their office. That excludes their right to the personal estate, even independently of the statute of 11 Geo. 4 & 1 Will. 4, c. 40. By the settled doctrines of the Court, ever since the case of *Middleton* v. *Spicer*(*a*), the executors being excluded, and there being no next of kin, the personal estate goes to the Crown.

The next question is, as to the payment of the legacies. What I have to consider is, whether, according to the terms of this will, the legacies are, in the ordinary course of administration, payable primarily out of the personal estate, or out of the mixed fund. This will contains a direction that the whole real and personal property shall

(*a*) 1 Bro. C. C. 301.

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be converted and constitute a mixed fund; and the testatrix directs all the legacies, with the exception of the legacy of 19*l.* 19*s.* to be paid out of the proceeds of her real and personal estate, that is, out of this mixed fund This case is entirely within the principle of *Roberts* v. *Walker*(*a*), and my decision must proceed on the principle of giving a rational interpretation to the whole will. If a testator says, that legacies are to be paid out of the proceeds of real and personal estate, a right of apportionment between the proceeds of the real estate and the proceeds of the personal estate, according to their respective values, is given. The legacies must therefore be apportioned. This case is in no degree governed by *Boughton* v. *James*(*b*).

But, it is said, that this matter is *res judicata*, and no longer open to discussion, because, by my order, of the 30th of June, 1853, made on further consideration of the cause on the certificate of my Chief Clerk, the executors are directed to pay the legacies out of the personal estate; and my Chief Clerk has certified that they have been paid, and that he has allowed such payments to the executors in their accounts of the personal estate. It is said, that the matter is concluded by that order and that certificate. But if there are facts upon the face of the certificate, which shew and bring it legitimately before the Court that the certificate proceeded on a mistake, the Court is bound to set it right. That is done as to a Master's report, even after it has been confirmed by an order of the Court.

So, also, as to the decree, it was *per incuriam*, and I am bound to set it right. As to the certificate, I am bound to give such further directions as shall duly administer the trusts of the will. No such decree should have

(*a*) 1 Russ. & My. 752. (*b*) 1 H. L. Cas. 406.

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*Judgment.*

been made; and, to say that I should put the parties who are entitled to the beneficial interest in the estate to the expense of a rehearing, in order to set matters right, is a proposition which I cannot entertain.

But I am not driven to that consideration, for the Attorney-General was not a party to the cause. He is only a party as from to-day, and his right is not bound by the decree.

If the parties can shew me, on affidavits, the amount in which the apportionment should be made between the real and personal estate, I will make the apportionment in the decree.

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*Minute of Order.*

Declare, that the legacies (except the legacy of 19*l.* 19*s.* to the charity) and the costs of all parties, including the costs of the Attorney-General, be paid rateably out of the proceeds of the real and personal estate; and that the Crown is entitled to the surplus of the personal estate.

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## HARRISON *v.* LANE.

*March 6th.*

Sixteen years after a decree for the administration of a testator's estate under which the amount in the hands of the executors had been paid into Court, and the decree not further prosecuted, the residuary legatees, being infants, on attaining twenty-one petitioned to have the fund paid out to them, according to the trusts of the will; and upon the affidavit of the executors, that there were no outstanding demands upon the estate, the Court ordered the amount to be paid to the petitioners.

In 1838, a bill was filed to administer the estate of Thomas Harrison, the testator in the cause, who died in 1837. The usual administration decree was thereupon made. In pursuance of a direction contained in the decree, the residue in the hands of the executors was paid by them into Court to the credit of the cause. The decree was not further prosecuted. By the terms of the testator's will, his children were entitled to the estate between them on the youngest child attaining twenty-one. This event having happened, the children presented a petition, asking for the payment of the fund out of Court to them.

In support of the petition, the executors deposed, that all the testator's debts had been paid, and that there were no outstanding claims upon the estate.

Mr. *Goodeve* was in support of the petition.

Mr. *Horace Wright* appeared for the executors, and consented.

The Vice-Chancellor said, that, having regard to the length of time that had elapsed since the decease of the testator, and to the affidavit made by the executors, stating that all the testator's debts had been paid, he thought he should be justified in making the order asked.

The order was made accordingly.

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*March* 21*st* & 22*nd*.

## LEE *v.* FLOOD.
## Ex parte LOTT.

As to the equity of set-off for partnership debts paid by a continuing partner, against a legal debt due from him to a retired partner, upon a bond for a private loan.

One of two partners, as bankers, lent to his partner a sum of money on the joint and several bond and covenant of the borrower and another person, in 1821, and died in 1833; the obligor continued to pay interest till 1843, when he died, and his executor paid interest up to 1847. On the death of the obligee in 1833, some settlement of the banking affairs was come to between his executor, and the surviving partner and another subsequently admitted, which the executor alleged was final, but which was disputed. The executor of the obligee then became a partner, and other changes subsequently took place in the firm, each new firm taking on itself all the former liabilities and assets. In 1847, the firm in which the executor had continued a partner became bankrupt.

In a suit for the administration of the estate of the obligor, certain creditors of the firm, on promissory notes given prior to 1833, whose debts had been adopted by the successive firms, were admitted as separate creditors of his estate. The executor of the obligee was admitted as a creditor for the loan, and no equitable set-off for contribution was allowed, none having been established in respect of the said estate of the obligee being separately liable to the creditors, although it was probable, that, in winding up the partnership affairs, some claim by the obligor's estate against the estate of the obligee might be established.

In an administration suit, a creditor's claim was admitted as a claim only by the Master's report, to which the creditor did not except. Shortly afterwards, the result of a suit tended to establish his debt; after more than a year, the creditor petitioned to be admitted as a creditor against the estate: —*Held*, that he might be admitted, without being charged with the costs, which had not been increased by the delay.

THIS was the petition of Mr. Harry Buckland Lott, as the executor of Harry Baines Lott, deceased; and it prayed, that the claim of the petitioner for the sum of 2515*l.* 12*s.* 3*d.*, with interest, from the 4th day of October, 1847, might be allowed; and that the same might be declared to be a valid and existing separate debt as against the estate of Christopher Flood, deceased, in the administration of his estate in the above suit.

The principal question was, as to the right of equitable set-off by a continuing partner, for partnership debts paid out of his separate estate, against the legal claim of the retired partner upon bond for a private loan.

It appeared, that Christopher Flood, deceased, and Philip Mules, were in partnership as solicitors; and on the 15th of September, 1821, they borrowed of Harry Baines Lott the sum of 6000*l.*; and on the same day they gave their joint and several bond to Mr. Harry Baines Lott for securing the amount, with interest at the rate of 5*l.* per cent. per annum, on the 15th of March then next. By an indenture, of even date with the bond, Christopher Flood and Philip Mules, by way of collateral secu-

rity, assigned a debt of 6519*l.*, and interest, due to them, and certain hereditaments, together with a policy of assurance for 5000*l.*, to Harry Baines Lott, with powers to apply the monies received from the securities and policy in discharge of the debt of 6000*l.* and interest.

Harry Baines Lott died on the 20th of June, 1833, having previously, by his will, dated the 16th of February, 1833, appointed Harry Buckland Lott, the petitioner, his sole executor and residuary legatee.

Interest on the sum of 6000*l.* was paid to Harry Baines Lott, and after his decease to Harry Buckland Lott, until the 16th of September, 1842, when the interest ceased to be paid. On the 4th of October, 1847, the principal and interest due on the securities was 7515*l.* 12*s.* 3*d.* On that day, Mr. Harry Buckland Lott, upon the decease of the person whose life was insured, received the 5000*l.* secured by the policy, and thereout paid himself all the arrears of interest due, and a portion of the principal of 6000*l.*, leaving a debt of 2515*l.* 12*s.* 3*d.* then due as principal monies, being the amount which, with an arrear of interest from the 4th of October, 1847, constituted the claim of the present petitioner.

Long previously to 1821, Christopher Flood and Harry Baines Lott, together with one Edward Lott, carried on business together as bankers at Honiton, under the firm of Flood, Lott, & Lott, until the year 1831, when the above defendant Christopher Samuel Flood was admitted a partner; and from that time the business was carried on under the firm of Flood, Flood, Lott, & Lott. This partnership continued until the 20th of June, 1833, when Harry Baines Lott died.

Shortly after the death of Harry Baines Lott, his son and executor Harry Buckland Lott, the petitioner, was, in the year 1833, admitted a partner in the firm, not in the character of executor of Harry Baines Lott, but in his own private and individual capacity only.

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LEE v. FLOOD. *Ex parte* LOTT.

*Statement.*

In the year 1836, Edward Lott died; and in the month of March, 1843, Christopher Flood died, having, by his will, appointed Christopher Samuel Flood his sole executor, who duly proved the will, and took upon himself the execution thereof.

Down to the 23rd of November, 1847, the banking business was continued by Christopher Samuel Flood and Harry Buckland Lott the petitioner, under the firm of Flood & Lott.

On that day, a fiat in bankruptcy was awarded and issued against Christopher Samuel Flood and Harry Buckland Lott, under which they were duly found and declared bankrupts.

By the decree made in the above suit of *Lee* v. *Flood*, dated the 29th of April, 1848, it was referred to the Master to take an account of what was due to the plaintiff, and all other the creditors of the testator Charles Flood, and of his funeral expenses, and to compute interest on such of his debts as carried interest after the rate of interest they respectively carried; the other usual inquiries were directed; and the personal estate was ordered to be applied in a due course of administration. In pursuance of the advertisements issued by the Master under this decree, the petitioner, Mr. Harry Buckland Lott, carried in a state of facts and his charge before the Master. In April, 1852, he produced his securities, and claimed to be a creditor for 2515*l.* 12*s.* 3*d.*, with lawful interest from the 4th of October, 1847.

The Master in the first instance allowed the charge as a valid debt against the estate; but, on a re-hearing, the Master allowed the claim as a claim only; and in his general report of the 17th of July, 1852, which was in due course shortly afterwards absolutely confirmed, he referred to the claim in the following terms:—

"And a charge having been laid before me on the part of Harry Buckland Lott, as the sole executor of the will

and testament of Harry Baines Lott, deceased, together with an affidavit by the said Harry Buckland Lott, sworn the 27th day of January, 1849, and two several affidavits of John David Chambers, of 6, Old-square, Lincoln's Inn, barrister-at-law, sworn the 14th day of February, 1849, and the 17th day of February, 1852, in respect of a sum of 2215*l.* 12*s.* $3\frac{3}{4}$*d.*, claimed as due to him as such executor as aforesaid, on a certain bond of the said testator and the said Philip Mules, dated the 15th day of September, 1821, and on a covenant contained in a deed of even date, and made between the said testator and Philip Mules of the one part, and Barnaby John Stuckey Bartlett of the second part, and the said Harry Baines Lott of the third part, I have allowed the same as a claim against the estate of the said testator."

It appeared by a memorandum made at the time of the rehearing, that the Master allowed the charge as a claim only, on the ground that it had been alleged by or on the part of the defendant Christopher Samuel Flood, that the said Harry Baines Lott having been a partner with Christopher Flood, deceased, there were debts still due from that partnership; and that Christopher Flood, or his estate, was a creditor of the said Harry Baines Lott and his estate, in respect of partnership debts paid by Christopher Flood or his estate.

It appeared, that the sole ground of such allegation on the part of Christopher Samuel Flood was, as appeared by the 6th schedule and part of the 7th schedule to the Master's general report, that certain simple contract creditors of Christopher Flood, deceased, had come in and proved their debts in the suit against his estate in respect of certain promissory notes or other documents therein mentioned, which had been given and signed by the bankrupt firms of Christopher Flood, Harry Baines Lott, and Edward Lott, and Christopher Flood, Christopher Samuel Flood, Harry Baines Lott, and Edward Lott, prior to the death of Harry Baines Lott.

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*Statement.*

The 6th schedule and part of the 7th schedule were drawn up by the plaintiffs in this suit without the knowledge of Harry Buckland Lott, the petitioner, and without his having any opportunity of controverting the statements therein contained.

The 6th schedule and part of the 7th schedule contained a long list of such creditors, the first item in which schedule was as follows:—

| | £ | s. | d. |
|---|---|---|---|
| Due to Robert Brown, of Challenger Farm, in the parish of Hambury, in the county of Devon, yeoman, on a promissory note of the said testator and his then partners, Christopher Samuel Flood and Harry Baines Lott, | 110 | 0 | 0 |
| And for interest thereon, at 3*l.* per cent. from the 22nd day of August, 1847, to the —— day of ——, 1852, - - - - - | | | |

The other items were to the like purport.

On the 6th of July, 1849, Robert Brown filed a bill on behalf of himself and all other the joint creditors of Harry Baines Lott, deceased, against Gordon and another, his devisees in trust, and Harry Buckland Lott, the sole cestui que trust of the residue, and the sole executor of the testator Harry Baines Lott, seeking to charge the estate of Harry Baines Lott with payment of the debts of the firm in which he had been partner, secured on promissory notes which had been adopted by the subsequent firms, of which Harry Buckland Lott was a partner, and kept in force by regular payment of interest until the bank failed in 1847. The plaintiff Brown failed to establish his equity against the estate of Harry Baines Lott, and the bill was dismissed with costs(*a*). The decision had reference only to the case of the plaintiff Brown, whose name was the

(*a*) See the case under the name of *Brown* v. *Gordon*, fully reported in 16 Beav. 302.

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*Statement.*

first in the list of the persons stated to be creditors of Christopher Flood in the 6th and part of the 7th schedules to the Master's report.

In that case it was adopted as a fact proved, that shortly after the death of Harry Baines Lott the affairs between his estate and the firm were favourably settled.

The cause was heard at the Rolls in May, and the Court gave judgment on the 3rd of November, 1852.

In the course of the hearing of this cause, it appeared that Mr. Brown and all other the creditors enumerated in the 6th and part of the 7th schedules had proved their debts in the bankruptcy of Christopher Samuel Flood and Harry Buckland Lott, the petitioner, and had received a dividend thereon, as being in truth creditors of the bankrupt firm.

The petitioner filed this petition in January, 1854, and after setting forth the above circumstances, stated that, upon the death of Harry Baines Lott, Christopher Flood, Christopher Samuel Flood, and Edward Lott, as the surviving partners, came to an account with the petitioner as the executor of Harry Baines Lott; and it being found that 2400*l.* and upwards was due from the surviving partners to the estate of Harry Baines Lott, the same was paid, shortly after the death of Harry Baines Lott, to Harry Buckland Lott, as his executor, by the said Christopher Flood, Christopher Samuel Flood, and Edward Lott, in full settlement and satisfaction of all matters and claims subsisting between the said partnership and the estate of Harry Baines Lott.

The petition also stated, that the allegations on which the Master had determined to receive Mr. Harry Buckland Lott's claim as a claim only were unfounded; that no act had been done to alter the rights of Mr. Bunn and the other creditors in the schedules; that more than twenty years had elapsed since the death of Harry Baines Lott; and that all the debts of the firms, of which Harry Baines Lott was member, had been paid, or were either barred by

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lapse of time or by the creditors accepting the substituted securities of the more recent firms; and that all the debts of Harry Baines Lott were paid, but that several of the legacies given by his will still remained unpaid, to an amount exceeding the claim of the petitioner.

*Statement.*

The prayer of the petition was, that the petitioner's charge and claim of 2515*l.* 12*s.* 3*d.*, with interest from the 4th of October, 1847, might be allowed, and that the same might be declared to be a valid, existing, and separate debt as against the estate and assets of Christopher Flood; and that an account might be taken of what was due to the petitioner as executor, and that he might be paid pari passu with the separate specialty creditors of Christopher Flood.

The petition was met by the affidavits of the defendant Christopher Samuel Flood denying absolutely, and of another deponent denying from the account books, that any settlement of accounts had ever been come to with Harry Buckland Lott as the executor of Harry Baines Lott, on his decease; but that the account between Harry Baines Lott and the successive firms was kept open, and carried on from time to time.

The state of facts which was carried in before the Master as the state of facts of Harry Buckland Lott was the same state of facts as was carried in by Sir Edmund Sanderson Prideaux and others, as the assignees of the bond and covenant of 1821, under an assignment made to them in April, 1844, for a full valuable consideration.

*Argument.*

Mr. *Elmsley* and Mr. *Hetherington*, in support of the petition.

The decision in *Brown* v. *Gordon* (*a*) has established the non-liability of the estate of Harry Baines Lott to the creditors whose debts formed the only ground of objection before the Master to the admission of the claim as a debt by the Master in the administration of the estate of Chris-

(*a*) 16 Beav. 302.

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*Argument.*

topher Flood, the testator in this cause. It is true, that, in the administration of this estate the Master finds these joint debts to be debts of the separate estate of Christopher Flood also. That is consistent with *Brown* v. *Gordon*, and with the settlement of the accounts come to on Harry Baines Lott's death, when the new firm adopted the liabilities of that firm. The affidavits for the respondents deny that there was a settled account; but the accounts shew a settlement, which, at this distance of time, must be assumed to have been final.

Mr. *Bacon* and Mr. *Lewin* for the plaintiff in the cause.

Mr. *Wigram* and Mr. *Hanson* for the defendant Christopher Samuel Flood.

Whatever accounts were come to on the death of Harry Baines Lott between his estate and the surviving partners, it was not such a regular account as to constitute a settlement of accounts, and to entitle his representative to say that all the future transactions were by the survivors alone.

The case of *Brown* v. *Gordon* does not seriously affect the present question. The plaintiff in that suit was one of the scheduled creditors of the firm to whom the estate of Christopher Flood is reported by the Master to be separately liable. The case of *Brown* v. *Gordon* has decided that Mr. Brown, one of these creditors, is not also a creditor upon the separate estate of Harry Baines Lott, on the ground that he had adopted the subsequent firms as his debtors, and had impliedly released the estate of Harry Baines Lott. That depended on conduct and circumstances, which are not shewn to apply to the other scheduled creditors. Again, the equities between partners are very nice, and the decision in *Brown* v. *Gordon* by no means goes to the extent of determining, that, even as to Brown's debt, Christopher Flood's estate will not have an equity for contribution towards its payment from Harry Baines Lott's estate,

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*Argument.*

even although that estate be not directly liable to the creditor.

There is a peculiarity in this case, that, from the death of Harry Baines Lott, his executor Harry Buckland Lott was a partner in the successive firms which adopted the debts of his testator's firm; his acts, therefore, which bound him personally, must be attributed to him also in his character of executor, and as binding the estate of his testator Harry Baines Lott, and continuing the liability of that estate; and on this ground the right of Christopher Flood's estate to contribution from Harry Baines Lott's estate is established.

Questions of this kind are difficult, and ought not to be determined upon petition. It has not been denied, that the estate of Harry Baines Lott was at one time liable to contribute to the payment of the scheduled creditors, to whom the Master finds the estate of another of the contributories, Christopher Flood, continues to be liable; but Mr. Christopher Samuel Flood, as representing Christopher Flood, denies that the estate of Harry Baines Lott ever was discharged from the liability; and as between these two parties, the right to set off this equitable right to contribution ought not to be thus summarily concluded.

The Master admitted this claim as a claim only, in February, 1852. He made his report in July, 1852. All the facts which the petitioner relies on were known to him then, and he ought to have excepted to the report forthwith. A creditor is let in after the report, only when he has no knowledge of the time when he should bring in his claim. After such delay the petitioner ought at least not to be allowed to come in, except upon payment of costs: *Gillespie* v. *Alexander* (*a*), *Sawyer* v. *Birchmore* (*b*), *David* v. *Frowd* (*c*), *Cattell* v. *Simons* (*d*).

(*a*) 3 Russ. 130.
(*b*) 2 My. & Cr. 611.
(*c*) 1 My. & K. 200.
(*d*) 8 Beav. 243; and see *Brown* v. *Lake*, 1 De G. & S. 144.

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*Argument.*

It appears that the petitioner has assigned all the debt which he claims to Sir Edmund Sanderson Prideaux and others for money paid to him: it is therefore substantially their petition; and if inquiries were directed, it would be found that the assignment was made by Harry Buckland Lott, not as an executor, but in his own right, as absolutely entitled to the debt, as clear residue of Harry Baines Lott's estate. If this be so, it lets in the rights of the assignees of Harry Baines Lott in bankruptcy; and in this way a right of set off by Christopher Flood's estate would arise.

At least, when there is so much ground for question and grave argument, the Court should not allow the claim made by the present petition.

Mr. *Elmsley* in reply.—The case of *Brown* v. *Gordon* entirely exonerates, at least in principle, the estate of Harry Baines Lott from the scheduled debts admitted against Christopher Flood's estate. It is not necessary to shew by any distinct single act that a retired partner has been discharged from his liability. It may be, and frequently is, inferred from facts and conduct: *Harris* v. *Farwell* (*a*). Here it is a fact, that for upwards of twenty years the debts were adopted by successive firms, without claim against the estate of the retired partner; and the conduct of all parties is consistent with such a transfer of liability.

As to the objection, that this claim is too late, the answer is, that assets enough remain in Court to the credit of the estate, without disturbing any thing that has been done; and the costs of this petition are not more than costs of exceptions would have been.

The VICE-CHANCELLOR:—

*Judgment.*

The more this discussion has proceeded the more satis-

(*a*) 15 Beav. 31.

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fied have I become that the Master's objection to admitting the claim of the representative of Harry Baines Lott to be a creditor upon the estate of the late Christopher Flood cannot be supported. There may be some objections to the form of the present application, but enough is before me upon this petition to raise the substantial question.

Upon the whole of the case, I am of opinion that the petitioner has established his claim, as the representative of Harry Baines Lott, to be admitted in the suit as a specialty creditor of Christopher Flood, deceased; and that there is no equitable set off to his claim which has been as yet proved.

The Master, by the memorandum which he made upon the hearing before him, gave as his reason for allowing the claim as a claim only, and not as a debt, that it was alleged on the part of the defendant Christopher Samuel Flood, that, Harry Baines Lott having been partner with Christopher Flood, deceased, there were debts still due from that partnership; and that Christopher Flood or his estate was a creditor of Harry Baines Lott and his estate in respect of partnership debts paid by Christopher Flood or his estate. The words of the memorandum shew that there was not sufficient reason for not allowing the claim as a debt. It is only alleged that there is a set-off. If it had been proved that Christopher Flood was a creditor of Harry Baines Lott in respect of the partnership debts to which his estate was liable, and although the amount had not been ascertained, the case would have been different. There may be some probability, that, in winding up the affairs of the partnership, some such claim may be ascertained; but it is clear that it cannot be ascertained without great difficulty, or without decision on questions of vast importance, and by no means of easy solution.

It is, however, said, that the Master was justified in the

view which he took of this claim, because there appears in the sixth schedule to his report a class of creditors to whom Harry Baines Lott is liable as a partner, together with the testator and Christopher Samuel Flood. In reference to this view of the case it must be remembered, that Christopher Flood, Christopher Samuel Flood, and Harry Baines Lott were partners, but that that partnership was dissolved by the death of Harry Baines Lott in 1833. Various deposit notes of that partnership are still outstanding, which still continue unpaid. As to them, there has been a dealing ever since by the continuing members of the firm, of whom the petitioner Harry Buckland Lott was one. Now it is contended, that, as interest was continually paid by the firm, of which the petitioner, as the representative of Harry Baines Lott was one, that was an acknowledgment of those debts which bound the assets of Harry Baines Lott. That is a very difficult question. I am, however, relieved from much of that difficulty by the circumstance that Brown, the first of the creditors in the sixth schedule, has taken proceedings in this Court before the Master of the Rolls, for the purpose of establishing his claim as against the estate of Harry Baines Lott, and that he has totally failed; his bill was dismissed with costs. How, therefore, can I be justified in assuming that these debts (that of Brown, the first in the schedule of them, having failed,) are such outstanding demands against Christopher Flood's estate as would make that estate a creditor for contribution against the estate of Harry Baines Lott. It is true, that, at the time of the Master's report, the decision at the Rolls had not been made; but, it having now been made, I am of opinion that I cannot, without contravention of the principles of the law of contract, hold that any claim of the estate of Christopher Flood exists against the estate of Harry Baines Lott in respect of those scheduled debts.

All that I am asked to do is, to allow Harry Baines

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Lott's representative to be a creditor on the estate of Christopher Flood, and I am bound to do so.

It is said, however, that the petitioner is wrong in point of form; and that the petitioner was negligent in not having excepted to the Master's report. This petition is in the nature of an exception to that report. If the receiving this petition were an indulgence, the petitioner should pay the costs of his petition. But this does not appear to me to be a case of indulgence. The Master's attention should have been drawn to the fact of the proceedings in the Rolls Court; and it is the more remarkable that it was not, because the date of the Master's report is after the hearing, though it was before the decision. This cause having come on for further directions, with the claim admitted as a claim and not as a debt, assets were left in Court undisposed of under the further directions, sufficient to meet the present claim. It was not an improper proceeding when the decree at the Rolls had removed the Master's difficulty, and had settled an important point in favour of the petitioner, that he should come to this Court with his petition in the nature of exceptions to the report. This is therefore not to be put on the footing of an indulgence, so as to make the petitioner pay the costs of this proceeding. I cannot think that this petition is more expensive than exceptions would have been. There was a slip on the part of the Master; and the conduct of all the parties before him, in not informing him of the proceedings at the Rolls, renders it improper to charge the petitioner with the costs of this petition.

Upon the whole, my opinion is, that the petitioner is entitled to be admitted to proof as a specialty creditor, and to have a sufficient part of the fund in Court appropriated to pay him, or to be paid pari passu with the other separate creditors.

Circumstances may arise to shew that the Master has come to a right conclusion; it may turn out that the estate of Christopher Flood may have a claim against the estate

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of Harry Baines Lott. Coming to the conclusion I do, the petitioner must not have the fund as his own, but it must be held by him as executor, as part of the estate of Harry Baines Lott, and as assets.

The amount must be carried over to a separate account.

*Judgment.*

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*Order.*

By the order it was declared, that the petitioner Harry Buckland Lott, as executor of Harry Baines Lott, deceased, was entitled to stand as a creditor of Christopher Flood, deceased, for the amount due to him for principal and interest on the bond in the petition mentioned, bearing date the 15th of September, 1821. And it was ordered, that an account be taken of what was due to the petitioner Harry Buckland Lott, as executor as aforesaid, for principal and interest on the debt of 6000*l.*, secured by the bond in the pleadings mentioned; and that so much of the 8217*l.* 4*s.* 4*d.*, Bank 3*l.* per cent. Annuities, which, by the proceedings in the cause, appeared to be standing in the name of the Accountant-General in trust in the cause, as would raise what, upon taking the account, should be found to be due for such principal and interest, should be sold with the privity of the Accountant-General; and that one of the cashiers of the Bank should have notice to attend and receive the money to arise by the said sale, who, upon the receipt thereof, was to pay the same into the Bank with the privity of the said Accountant-General, to be there placed to the credit of the cause; and that the money to arise by the said sale, when so paid into the Bank, should be carried over to the credit of this cause, to an account to be intitled "The account of Harry Buckland Lott, executor of Harry Baines Lott, deceased," subject to the further order of the Court. And that the said sum, when so carried over, was not to be paid out without notice to the defendant Christopher Samuel Flood and to Sir Edmund Sanderson Prideaux and others, the assignees of the bond and covenant of 1821.

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*April 28th.*

## HICHENS *v.* KELLY.

In a foreclosure suit, a trustee, in whom was vested the legal estate in the mortgaged property, and who had agreed to convey it to the plaintiff when required, is a necessary party.

THOMAS HICHENS, being entitled to a lease of certain real estate in Cornwall, by an indenture between T. Hichens of the first part, Sarah Clark of the second part, and William Tellam Reynolds of the third part, in consideration of 600*l.* advanced by S. Clark, assigned the said lease by way of mortgage to Wm. T. Reynolds as her trustee, upon trust, to secure the said principal moneys, and interest at 4½ per cent., with a power to sell the said lease in default of payment of the principal and interest by a given day.

The testator, by his will, dated the 9th of September, 1824, bequeathed inter alia the lease to his son Thomas Hichens upon certain trusts, and appointed Thomas Hichens and the plaintiff his executors, who duly proved the will.

The plaintiff, at the request of his co-executor, advanced considerable sums in payment of the testator's debts. In March 1832, Wm. T. Reynolds gave notice to the executor of his intention to sell the leasehold property, upon which the plaintiff, at the request of his co-executor, paid off the mortgage debt, and received the title deeds of the property. No assignment was executed by Reynolds, but the following memorandum was given to the plaintiff:—

"Received this 15th day of October, 1832, of Mr. Wm. Hichens, one of the executors under the will of Mr. Thomas Hichens, deceased, the sum of 675*l.* in payment of the principal and interest due on the late Mr. Hichens' mortgage to Miss Sarah Clark, bearing date the 20th of December, 1824; and I do engage, as the trustee for the said Sarah Clark, to execute to the said William Hichens a transfer of the said mortgage, the same being by or at the

expense of the said Wm. Hichens, and tendered to me for the purpose of such execution. W. T. REYNOLDS.

"Witness, Saml. Rawlings."

*Statement.*

Upon the investigations of the accounts it appeared, that, on the 15th of March, 1839, a balance of 839*l.* was, and has always been admitted, due to the plaintiff from Thomas Hichens, jun. Thomas Hichens, jun., being indebted to Mrs. Sincock, his sister, in a sum of 600*l.*, and to the plaintiff in a sum of 500*l.* over and above the sum of 839*l.*, and nine years arrears of interest, by a letter dated the 6th of September, 1847, agreed that the deeds in the plaintiff's hands, including the said lease, should stand charged with such sums. The plaintiff was the trustee of Mrs. Sincock's marriage settlement.

After the settlement of the accounts, by an arrangement, the plaintiff allowed a new lease to be taken of the property for younger lives, on condition that the new lease should be charged with the amount of the plaintiff's debt. In accordance with such agreement, the plaintiff in 1844 delivered the old lease to Thomas Hichens, and shortly afterwards received from him the new lease, which was dated the 2nd of May, 1840.

On the 31st of December, 1851, the defendant Mary Kelly served a notice on the tenant of the leasehold property, claiming to be a mortgagee of the residue of the term of the old lease for a sum of 400*l.* and interest, in priority to the plaintiff's equitable mortgage and further charge. On the 5th of January, 1852, Thomas Hichens became bankrupt.

It appeared that the possession of the old lease had never been given up.

The plaintiff filed this bill, praying:

1. For a declaration that all the estate and interest in the old lease was extinguished; but if not, that it was subject to all rights and equities existing prior to such alleged mortgage.

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HICHENS v. KELLY.

*Statement.*

2. For an account.

3. That the defendants might be decreed to pay what was due to the plaintiff for principal and interest; and in default, that they might be absolutely foreclosed of all right and equity of redemption in and to the said mortgaged premises.

4. And for further relief, &c., &c.

The bill was filed against the alleged mortgagee Mary Kelly, Mr. and Mrs. Sincock and their children, and the assignees of the bankrupt.

William T. Reynolds was not a party to the suit.

*Argument.*

Mr. *Bacon* and Mr. *W. A. Collins* appeared for the bill.

Mr. *Wigram* and Mr. *Coryton* for the defendant Sincock.

Mr. *Shebbeare* for the assignees of the bankrupt.

Mr. *Craig* and Mr. *Terrell* objected, that Wm. T. Reynolds, in whom the legal estate was vested, was not before the Court. In *Wood* v. *Williams* (*a*), which was undistinguishable from this, it was held that a foreclosure suit so constituted was defective.

*Judgment.*

The VICE-CHANCELLOR said, this case could not be distinguished from *Wood* v. *Williams*. There the Court held, that, in a suit to foreclose, the trustee of the mortgaged property must be before the Court, in order that the Court may see that the title of the mortgagee is complete. The only distinction in this case is, that the title is derivative; but that circumstance could not affect the principle. The suit must, therefore, stand over, with liberty to the plaintiff to amend by adding parties.

(*a*) 4 Madd. 186.

1854.

## LAZONBY *v.* RAWSON.

*April 29th.*

The executor of a testator, having given to a legatee the Legacy Office receipt for duty on the legacy, on a bill filed against the executor of the executor of the original testator by the legatee, to establish the legacy:—*Held*, an admission of assets.

THIS bill was filed by Henry Paul Lazonby and Matilda his wife against James Rawson and James Torkington, the executors of Stephen John Charlesworth; and it prayed that a sum of 2000*l.* might be raised and paid, or secured; and in default thereof that the real and personal estate of the said Stephen Charlesworth might be administered in this Court; and, that if the defendants should not admit assets of their testator Stephen John Charlesworth, then for an account.

Stephen Charlesworth, by his will, dated the 25th of February, 1807, gave to his son Stephen John Charlesworth, a messuage and several closes of land in the county of Lincoln, held under Brown's Hospital in Stamford, for three lives; and the said testator desired his son Stephen John Charlesworth to apply to the said hospital to change one of the lives for that of his daughter Sarah Charlesworth; and he declared that the premises so devised were to be subject to an annuity of 100*l.* to his daughter Sarah Charlesworth, for her life, with power of entry and distress to secure the same; and after the decease of his said daughter the testator bequeathed to Thomas Thorp and William Proudman, and the survivor of them, his executors, &c., &c., the sum of 2000*l.*, to be paid by and out of the said leasehold messuage, closes, lands, and premises, which he thereby charged with the payment thereof; and in case the said leasehold estate should happen to be insufficient to pay the said sum of 2000*l.*, then and in such case he thereby charged his personal estate with the payment thereof, on trust for the use and benefit of an only child, or all and every the children of his said daughter Sarah, in equal shares. The testator appointed his son, Stephen John Charlesworth, his executor.

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*Statement.*

At the date of the will the leasehold premises were held under a lease, dated 1799; which was surrendered, and a new lease granted in 1807 to the testator, for the lives of his daughter Sarah and two other persons.

The testator died 1st March, 1807; and his will was proved in the May following by Stephen John Charlesworth; his personal estate was sworn under 2000*l.*, which did not include the said leaseholds, inasmuch as they were limited to his heirs.

Sarah Charlesworth intermarried with Thomas Charlesworth, and had one daughter, who attained twenty-one, and intermarried with the plaintiff.

Stephen John Charlesworth made his will on the 22nd of February, 1850, by which he devised and bequeathed his real and personal estate to the defendants Rawson and Torkington, on certain trusts; he also appointed the same gentlemen his executors. He died on the 5th of March, 1852, and his will was proved by his executors.

Sarah Charlesworth survived the other lives contained in the lease. The hospital—the charity having been made the subject of a commission—declined to renew the lease.

The 2000*l.* never having been raised, the plaintiff filed this bill to have the legacy secured during the lifetime of Sarah Charlesworth.

The defendants admitted assets of their testator Stephen John Charlesworth. In order to shew an admission of assets by Stephen John of his testator Stephen Charlesworth, the following receipt (Exhibit A.) being a form filled up and signed, was put in evidence.

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*Statement.*

"Form No. (1).

"To be used from and after the 31st August, 1815.

"STAMP OFFICE.

"Receipt and Discharge for any specific, pecuniary, or other Legacy

"Given out of personal estate, or out of or charged upon real estate, or out of monies arising by the sale or mortgage of real estate, and for the residue or share of residue of personal estate, or the residue or any share of residue of monies arising by the sale or mortgage of real estate, where the same shall be of the amount or value of 2000*l.* or upwards, and given or devolving to or for the benefit of a descendant of any child, or the father or mother or any lineal ancestor, or to collateral relations or strangers in blood to the deceased, pursuant to Acts 36 Geo. 3, c. 52; 45 Geo. 3, c. 28; and 55 Geo. 3, c. 184.

"Register. No. 182. Folio.

"An account of the personal estate of Stephen Charlesworth, late of North Witham, Lincoln, who died on —— day of —— one thousand eight hundred and seven.

BETWEEN—

| Names of the Executors or Administrators, Devisees in Trust, or Heirs-at-Law. | Their Residence | And Profession. | State whether Executors, Administrators, Devisees in Trust, or Heirs-at-Law. |
|---|---|---|---|
| Stephen John Charlesworth | | | Executor. |

Acting under Probate of Will granted by the Prerogative Court of Canterbury on the 27th day of May, 1807.

And No. 86.

| Name of the Legatee or Next of Kin. | Degree of Relationship, if any, to be here noted as on the other side. | Describe the Nature of the Bequest; and, if Residue, say what part or share. | Price of Stocks. | Value. £ | s. | d. | Rate of Duty per Cent. | Amount of Duty. |
|---|---|---|---|---|---|---|---|---|
| Sarah Charlesworth | Daughter. | 2000*l.* charged on Real Estate. | | 2000 | 0 | 0 | 1 | 20*l.* |

One Per Cent. Legacy.

"Retained the 11th day of December, 1821, the above being for the legacy out of the real estate above mentioned, having first allowed or paid 20*l.* for the duty thereon.

"STEPHEN JOHN CHARLESWORTH."

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The Form contained certain directions, and a statement of the penalties and rates of duty, and bore the following receipt indorsed:—

"STAMP OFFICE.

*Statement.*

"Received the 11th day of December, 1820, the sum of 20*l.* for duty, on account of the personal estate within mentioned.

"£20. "G. R. PUGH.

"Comptrolled, W. DOUCE, R. C.

"CHARLES PRICE, Reg."

The receipt above given was produced by Sarah Charlesworth, and was verified by affidavit as follows:—

"That Leonard Piddock, late of Ashby de la Zouch, a solicitor, deceased, was employed by my late husband a year before his death, which took place in 1818, to apply to my said brother respecting the security for the payment of the sum of 2000*l.* given to my children by the will of my said father; and some time after the death of my said husband the said Leonard Piddock, as I have been informed and believe, gave over to the son of my said husband by a former marriage, and with whom he was then living, certain papers, which papers the said Leonard Piddock had in his possession, that had belonged to my said husband, and among them was, I believe, the Legacy Receipt produced and shewn to me at the time of my making this my affidavit, and marked with the letter (A); and the said son of my said husband gave the said receipt to me; and the same receipt has been ever since in my possession.

"That I know and am well acquainted with the handwriting of my said brother Stephen John Charlesworth; and that the name Stephen John Charlesworth, written at the foot of such receipt, is in the handwriting of my said brother."

*Argument.*

Mr. *Malins*, Mr. *Simpson*, and Mr. *W. D. Lewis*, appeared for the plaintiff.

Mr. *Wigram* and Mr. *Renshaw* contra.

*Judgment.*

The VICE-CHANCELLOR said, the bill asked to have the legacy given by the will of Stephen secured out of the assets of Stephen John Charlesworth, who, it alleged, had left assets sufficient to answer the legacy. The question raised was, whether there was a sufficient admission of assets of Stephen by Stephen John. It appeared, that,

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LAZONBY v. RAWSON.

*Judgment.*

many years ago, Stephen John delivered to the brother of the plaintiff the ordinary Legacy Office Receipt, shewing that he had paid the duty on the legacy. It is said, that he gave it to satisfy his mind. In his opinion that amounts to an admission of assets by Stephen John.

*Affd. 4 De Gex & Sm. 533.*

## LOVEGROVE *v.* COOPER.

*May* 31*st.*

Monies arising under a will, and paid by the executors into Court in a creditor's suit, *held* legal assets.

The proceeds of real estate directed by the Court to be sold for payment of debts, and paid by the purchaser into Court, *held* legal assets.

THIS was a creditor's suit. By the decree, dated the 10th of March, 1852, the usual accounts were directed to be taken of the estate of Charles Cooper, who died intestate.

By his report, dated the 18th of February, 1854, Master *Humphrey* found, inter alia, that the intestate was indebted on specialty debts to the amount of 1223*l.* 7*s.* 9*d.*, and on simple contract debts to the amount of 2105*l.* 14*s.* 7*d.* The Master further found, that there was then standing in the name of the Accountant-General, in trust, and to the credit of the above-mentioned cause, 2825*l.* 3*s.* 3*d.* in Bank 3*l.* per cent. Annuities and cash; that such Bank Annuities and cash, together with the personal estate outstanding and unreceived, formed the personal estate of the said intestate.

The Master found also, that, on the 26th day of July, 1851, Thomas Mansell and W. E. Cooper paid into Court to the credit of the above-mentioned cause, "The Real Estate Account," the sum of 154*l.* 1*s.*, being the balance of the said purchase-money and interest thereon, after deducting the principal, interest, and costs which were due on the said security.

The fund found by the Master to be in Court, exclusively of the real estate account in Court, arose as follows: In the suit of *May* v. *Grave*, which was a suit to administer the estate of William May, the Master found that the children of Ann Cooper, deceased, of whom the intestate was one, were entitled each to one-fifteenth part of two sums of 4000*l.* Reduced Annuities, and 1000*l.* New 3¼ Consols,

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*Statement.*

under the will of the said William May, the testator in the cause.

On a petition in that suit, the one-fifteenth share, amounting to about 300*l.*, was paid to Mrs. Cooper, the defendant in the suit of *Lovegrove* v. *Cooper*, and was immediately paid by her into Court, to the credit of *Lovegrove* v. *Cooper*.

On the 21st of November, 1850, a motion was made in the suit of *Lovegrove* v. *Cooper*, by the executors of Catherine May, that they might be at liberty to pay into Court, to the credit of the above-mentioned cause, the sum of 1567*l.* 7*s.* to the account of the intestate's share in William May's estate. The money was accordingly paid in and invested.

A similar motion was made on the 21st of December, 1851, by the trustees of Charles May, for liberty to pay into Court the sum of 980*l.* 15*s.* 6*d.*, as Charles Cooper's share of the residuary estate of Charles May, deceased. The money was accordingly paid in.

By a decree on the 10th of March, 1849, the real estates of Charles Cooper, the intestate, were ordered to be sold; which was accordingly done, and the proceeds, amounting to 1269*l.* 8*s.* 3*d.* with interest, were, on a petition heard on the 3rd of May, 1851, ordered to be carried to the real estate account in the cause of *Lovegrove* v. *Cooper*.

*Argument.*

Mr. *Walker* and Mr. *F. O. Haynes*, for the simple contract creditors, submitted, that the whole fund, including the proceeds of the real estate, which had been directed to be sold, being recoverable in equity, became equitable assets. It was held by Lord *Hardwicke*, that an equity of redemption was equitable assets: *Hartwell* v. *Chitters* (*a*).

Mr. *Bacon* and Mr. *Busk* appeared contrà, but were not called on.

Mr. *Faber* and Mr. *Ellis* appeared for other parties.

(*a*) Amb. 308.

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*Judgment.*

His Honour said, he thought it was now well settled, that assets actually realised and in the hands of the executor as money were legal assets. The sums in question, though paid into Court, were as to the rights of the creditors in the same situation as in the hands of the executor (*a*).

(*a*) The modern practice, notwithstanding the decision by Lord *Hardwicke* in *Hartwell* v. *Chitters* (Ambler ed. Blunt, 308) (upon the authority of Sir *Charles Cox's case**, in which, however, the point does not appear to have been decided) † seems to be in conformity with the old rule. In *Harecourt* v. *Wrenham*‡, executor's assets were defined to be "En Chancery quel est veigne as maines l'executor," and "2. Si le somme decree en equity en Chancery sera assets, ils touts agreeont que ceo seroit assetts quia le jury ad trove que ceo fuit per reason del executorship veigne as maines des executors." In Rolle's Reports, vol. 1, p. 56, it is said, "Nota per *Coke, Croo.* & *Dod.*, 'que si executor recover come executory matters en Chancerie per equitie que cest chose recover sera assets,' et Coke cite le Co. Chapman: et per Curiam—Si jeo devise que mon executors venderont mon terre si ils vendont, ceux deniers ne unque fueront en le testator uncore pur ceo que ils vient al eux come executors sera assetts: la darren jour fuit adjudge per Cur. in banco que deniers recover per executors en equitie serra assets, come Dod dit, &c. &c. * * * 'le question fuit au ceux deniers issint recover en Chancerie serroient estre assets fuit adjudge per totam Curiam que cy.'"

Mr. Story lays down the rule thus: Story Equity Juris. vol. 1, pp. 633, s. 551. "That portion only of the assets of the deceased party are deemed legal assets, which are directly liable in the hands of his executor or administrator to the payment of debts and legacies; legal assets generally are such as can be reached in the hands of an executor or administrator by a suit at law against him, either by a common judgment or by a judgment upon a devastavit against him personally. But it is perhaps more accurate to say, that legal assets are such as come into the hands and power of an executor or administrator, or such as he is entrusted with by law virtute officii to dispose of in the course of administration. In other words, whatever an executor or administrator takes qua executor or administrator, or in respect of his office, is to be considered legal assets."

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* 3 P. Wms. 341. † Ibid. 344. edit. by Cox. ‡ Moore, 858.

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*May* 31*st*.

## CHICK *v.* BLACKMORE.

On a sale, by the executors, of the book debts of their testator, the debtors to the estate being also creditors, both on trade and also private debts, but claiming no right of set-off:—*Held*, the purchaser entitled only to the balance remaining due, after deducting both trade and private debts due from the testator's estate.

THE suit was instituted to administer the estate of Elijah Chick, deceased, innkeeper and brewer, of Sidmouth, Devonshire. By a decree, made on the 24th of May, 1850, it was referred to the Master, inter alia, to take the usual accounts.

By his report, dated the 6th of March, 1854, the Master found, that the testator died on the 10th of September, 1849; and that at the date of his will he was possessed, inter alia, of the freehold hereditaments, known respectively as the Ship Inn and Town Brewery at Sidmouth, the new Commercial Inn and the Marine Hotel also at Sidmouth; and the Master found that such real estates and certain leasehold tap and stables adjoining thereto, together with all the machinery, plant, stock-in-trade, household furniture, book debts, and other personal estate and effects, free and clear of and from all mortgage debts and other liabilities except the rents, &c. &c., were, on or about the 29th day of November, 1849, sold to the defendant Elizabeth Stockdale, then Elizabeth Chick, widow of the testator, by private contract, for a sum of 4100*l.*, which, with 213*l.* in part payment of interest, had been received by the executors.

It appeared in evidence that the testator, at the time of his death, was indebted for trade debts in a sum of 147*l.* 18*s.* 7½*d.* to various persons, who were also indebted to him on a cross account.

The testator also owed a sum of about 75*l.* for private debts, to persons who were also his debtors. After the sale to the testator's widow, the debtors on the books of the testator paid to his widow the amount due from them, without claiming any right of set off. The executors subsequently paid to the parties respectively entitled the

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amount due to them from the testator's estates, without claiming to deduct the amount due from them to the estate, and which they had paid to the widow.

*Statement.*

The Master, at the request of the defendants, certified that he had disallowed the several payments made by them, set forth in the 4th schedule (the trade debts) to his report, such payment having been made by them subsequent to the sale to the said Elizabeth Stockdale; and the several persons to whom such payments were made being indebted to the said testator's estate on account of the trade or business carried on by him, in sums which ought to have been set off against the payments so made by them as aforesaid, and allowed by the said E. Stockdale as the purchaser of the book debts, as mentioned in the said sale, he being of opinion, in settling the book debts of the said debtors to the said testator's estate, that the said Elizabeth Stockdale was only entitled, in respect of her purchase of such book debts, to the balances resulting from a fair taking of the accounts in respect of such book debts respectively; but he had allowed similar payments where the same became due in respect of private debts of the said testator, not considering that such private debts came under the description of book debts, or that the same could be set off against the sums due in respect of the said testator's trade or business; and such payments so allowed by him are included in the said account of the said defendants.

*Argument.*

Mr. *Bacon* and Mr. *C. M. Roupell* for the legatees, contended, that the words "book debts," which were perfectly well understood in the mercantile world, signified the balance due to the testator's estate, after deducting every sum in respect of which a right of set-off existed.

Mr. *Malins*, for the executors, contended, that the words "book debts," meant such accounts as appeared due on the

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*Argument.*

books. How could a purchaser know what he was purchasing if the sums appearing due on the trade books were to be reduced by whatever amount any person might be able to establish against the testator's estate. To introduce the rule now insisted on, would be to deter every person from purchasing this species of property. No injury to the estate could result from holding that the book debts signified what appeared due on the books, because, in such case, the property would always command an adequate price in the market.

Mr. *Jessel* appeared for the widow, and claimed to be entitled to the amount appearing due on the books. There was here no case of set off, inasmuch as the debts had been paid by the debtors without objection. Any other construction of the words "book debts" would be to compel creditors, whether they would or not, to insist on a set off.

Mr. *Erskine* appeared for the executor of Samuel Chick the elder.

The VICE-CHANCELLOR:—

*Judgment.*

The question is, whether what was sold by the executors to the widow under the denomination of book debts, was the balance of what was due to the testator's estate when the accounts were properly adjusted; or whether, on the sale of the book debts, the widow was entitled to the amount appearing due on the books?

The testator was a brewer and kept books, though not very regularly as it appeared, in which were entered only the debts due to him. Both the executors and the purchaser say that in this contract they dealt only with what appeared due upon the books themselves.

Generally the book debts are the balance only of what, on the adjustment of the testator's accounts, is due to his estate from those persons with whom he dealt. It is con-

tended, however, that the meaning of the words "book debts" is the amount appearing due on the books; but such a construction appears to me erroneous, and likely to lead to a great deal of difficulty in administering an estate. It would not be contended, that, if the entry in the books were erroneously a larger sum than was actually due, the purchaser was entitled to a sum equal to the amount stated in the books. Then it is said, that, to construe "book debts" as the balance only which is due, will be to establish as imperative the law of set off, which is at present only optional, and therefore to vary the rights of purchasers. But on what principle could the debtor be allowed the option of depriving the testator's estate of the right of having the account settled so as to ascertain and receive the actual balance, which is the real amount of the debt? In my opinion, what is sold is what can be recovered in the name of the executor, which must always be subject to the right of set off in the debtor. I must look to the assets; and such a construction of the contract as would give to the purchaser of the book debts not the real debt due to the estate, but something possibly very different, cannot be the right construction. I think, therefore, that the Master was right in disallowing the payment of the trade debts by the executors.

As to the private debts of the testator, that is, the debts unconnected with his business, which the Master has allowed, I think the same principle is applicable. The true criterion is, whether, to an action in the name of the executors, the creditor would be entitled to plead a set off. The law as to the right of the creditor to a set off makes no distinction between private and trade debts. In either case the debt due to the testator's estate would be liable to be reduced by the amount due from the testator. I think the Master was wrong in allowing to the executors the payment out of the assets of the private debts.

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*May 8th; June 6th.*

Under the 15 & 16 Vict. c. 86, s. 48, the Court has power, after decree for foreclosure, to direct a sale.

On the petition of an insolvent mortgagor and two of his creditors, with the concurrence of the plaintiff (the first incumbrancer), the Court, after a decree in a foreclosure suit, and upon payment into Court of a sum sufficient to indemnify a puisne incumbrancer, made an order for a sale.

## LASLETT *v.* CLIFFE.

THIS was the petition of William Bateson Cliffe, the mortgagor, and of Charlotte Berrow and Walter Haynes, two of the creditors under his insolvency; and it prayed, that, notwithstanding the decree of the 4th of June, 1853, the mortgaged premises comprised in the indenture of the 29th of September, 1842, might be ordered to be sold, and the proceeds applied in paying what was due to the plaintiff for principal, interest, and costs, and then in payment of what was due under the indenture of the 19th of October, 1844, in payment of the costs of all parties to the petition, and then for the benefit of the creditors of the petitioner, William Bateson Cliffe.

By an indenture, dated the 29th of September, 1842, certain real estates comprised in the deed were conveyed by the petitioner Cliffe by way of mortgage to the use of Messrs. Barclay & Tritton, to secure 21,000*l.* The deed contained a proviso for redemption, and a power of sale. By an indenture, dated the 11th of January, 1843, between Cliffe and James Thomas Woodhouse, Cliffe released the same hereditaments to the use of Woodhouse, by way of mortgage, to secure 300*l.* and any further advances, but subject to the prior mortgage. Thomas Woodhouse subsequently contracted to sell a part of the mortgaged property to Feargus O'Connor, who paid as a deposit 1505*l.*

By an indenture, dated the 14th of April, 1849, reciting that 10,172*l.* 2*s.* was then due to Woodhouse, and on the security of the said indenture of the 11th of January, 1843, and that Woodhouse had obtained a judgment against Cliffe for 7416*l.* 6*s.* 11*d.* part of such said sum, and reciting the contract for sale, and deposit by Feargus O'Connor, it was witnessed, that, in consideration of the said sum of 5000*l.* paid by the plaintiff to Woodhouse,

the latter assigned to the plaintiff the principal sum of 5300*l.*, owing at the date of the deed of the 11th of January, 1843, and the principal sums of 7416*l.* 6*s.* 11*d.* and 10,172*l.* 2*s.* 5*d.*, and the judgment and interest, and all arrears, and all the rights of the said Woodhouse in certain other securities, subject to a proviso for redemption by the said Woodhouse.

By an indenture, dated the 19th of October, 1843, Cliffe mortgaged the same premises (subject to the first mortgages) to William Finch and John Jones, formerly his solicitors, to secure a sum of 200*l.* Finch died on the 1st of March, 1845, intestate; and letters of administration had been granted of his estate to Mary Finch, a defendant in the suit.

In January, 1852, Cliffe took the benefit of the Insolvent Act, and William Reece became his provisional assignee, and Charlotte Berrow and Walter Haynes, the creditors' assignees under his insolvency.

On the 18th of February, 1852, Woodhouse became a bankrupt.

Part of the mortgaged premises were sold under the power contained in the first mortgage deed, and the proceeds applied towards payment of the first mortgage, which reduced it from 21,000*l.* to about 16,850*l.* at the date of the filing of the bill.

Subsequently to the date of the bill, the first mortgage and the securities were absolutely assigned to the plaintiff, his heirs, &c.

The plaintiff filed his bill to foreclose the mortgage against the mortgagor and the puisne incumbrancers. By a decree, dated the 4th of June, 1852, made by consent of all parties except the petitioner Cliffe, (and a formal party named Paine), the following accounts, inter alia, were directed:—

An account of what was due to the plaintiff as assignee

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*Statement.*

of Messrs. Barclay & Tritton, for principal and interest, and for costs, in respect of the said mortgaged premises.

An account of what had been received by the mortgagees under the securities, including the proceeds of the sales that had been effected.

An account of what was due to the plaintiff for principal and interest on the indenture of the 14th of April, 1849, and for his costs of suit; and also an account of the monies received on the said indenture.

"That, upon the defendant John Jones and Charlotte Berrow, Mary Finch, or either of them, paying to the plaintiff what should be found due to him for principal and interest, costs, charges and expenses, as aforesaid, within six months after the Chief Clerk should have made his certificate, it was ordered that the plaintiff should reconvey the said premises to the said John Jones and Charlotte Mary Finch, or either of them, who should so redeem; but in default of the said John Jones and Charlotte Mary Finch, or either of them, paying to the said plaintiff what should be so certified, it was ordered that the said Charles Rideout, John Jones, Charlotte Mary Finch, William Reece, and William B. Cliffe, &c., should stand thenceforth absolutely debarred and foreclosed from all right, title, interest, and equity of redemption of, in, and to the said mortgaged premises.

On the 11th of February, 1854, the Chief Clerk made his certificate, by which he found that there was due to the plaintiff, on the first mortgage, a balance of 15,550*l.*, and on the second of 5744*l.* 14*s.* 5*d.*

At the time when the decree was made, John Jones, by an agreement with Reece, the provisional assignee of the mortgagor, Cliffe, purchased the equity of redemption in the said property for a sum of 50*l.*

He subsequently purchased other incumbrances on the property, but to what amount did not appear. These circumstances were not in evidence at the hearing of the cause.

The petitioners presented this petition for a sale, in which they offered forthwith to pay what should be found due to the said John Jones and Charlotte Mary Finch, &c. &c.

*Argument.*

Mr. *Malins* and Mr. *Hallett*, in support of the application for a sale, contended, that the property was worth a great deal more than the amount of the incumbrances upon it. In this Court a mortgage was only regarded as a security for the consideration given; and if the defendant Jones was paid his debt, interest, and costs, he would receive all to which he could lay any claim.

Mr. *Wigram*, for the plaintiff, concurred in the application for a sale.

Mr. *Bacon* and Mr. *G. L. Russell* for the defendant Jones. —The Court has no power under the Act (*a*) to direct a sale after a decree for foreclosure: *Girdlestone* v. *Lavender* (*b*), *Wayn* v. *Lewis* (*c*). But, assuming the Court had power to direct a sale after a decree for foreclosure, it was not bound

(*a*) The following is the section referred to (15 & 16 Vict. c. 86, s. 48)—"It shall be lawful for the Court, in any suit for the foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee or of any subsequent incumbrancer, or of the mortgagor or any person claiming under them respectively, to direct a sale of mortgaged property instead of a foreclosure of such equity of redemption, on such terms as the Court may think fit to direct, without previously determining the priorities of incumbrances, or giving the usual or any time to redeem; provided that if such request shall be made by any such subsequent incumbrancer or by any person claiming under them respectively, the Court shall not direct any such sale without the consent of the mortgagee or the persons claiming under him, unless the party making such request shall deposit in Court a reasonable sum of money, to be fixed by the Court, for the purpose of securing the performance of such terms as the Court may think fit to impose on the party making such request."

(*b*) 9 Hare, liii. Appendix.

(*c*) 22 L. J., Chanc., 1051.

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*Judgment.*

to exercise it. Here the mortgagor was an insolvent, and was not entitled to be heard on the application, his whole estate being vested in his assignee, who had sold the equity of redemption to the puisne incumbrancer Jones.

The VICE-CHANCELLOR:—

This is a case of considerable importance and of some difficulty. The recent stat. 15 & 16 Vict. c. 86, s. 48, has given power to direct a sale in a suit to foreclose. It is objected, however, that this power must be exercised at or before the hearing of the cause; because it is said, after pronouncing a decree for foreclosure, the Court has no power to direct a sale, unless it should re-hear the cause. I should regret to feel myself compelled to put so narrow a construction on the enactment, the effect of which would be to deprive the Act of a great part of the advantage it was designed to confer. I think also I should be doing great injustice to Vice-Chancellor *Turner*, if I were to treat the case that has been cited as an authority for refusing, after a decree for foreclosure, to direct a sale in a suit in which the first incumbrancer is the plaintiff, who has obtained the decree, has had the carriage of the suit, and concurs in the application for a sale. Upon what principle ought this Court, where a plaintiff has obtained a decree, to insist upon his proceeding against his will on a decree which he obtained for his own advantage, when he prefers a different course authorised by the legislature? In my opinion, the right to a sale must depend entirely on the circumstances of the particular case under which the application is made. The language of the statute is most comprehensive, and contains no restriction as to whether the sale shall be directed either before or after the decree. What the Court is to consider is, who is the person making the application, and how the rights and interests of the parties to the suit are likely to be affected if a sale should be directed.

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*Judgment.*

The decree in this suit was made in the presence of Mr. Cliffe, the mortgagor, and his assignee, and so far as the mortgagee's interest was concerned, is framed in a remarkable way. That the mortgagor, though insolvent, had an interest, is plain, and an interest recognised by law; and accordingly the decree proceeds to deal with his interest, at the same time that it took care to record the fact that it was a decree not made by his consent. It appears, beyond dispute, that the defendant Jones has purchased for 800*l.* the right of realising the incumbrances on this property, and objects to a sale. On the other hand, the first mortgagee and the person entitled to the ultimate right of redemption concur in desiring to have a sale. Notwithstanding the decree, I think I should be doing injustice if I refused to accede to their wish. It is contended, that there may occur a miscarriage in the sale; but, the Court can impose terms, and the sale must be with the Court's approbation, and if an insufficient sum should be offered for the property, the Court will not permit the sale to be effected. On the other hand, if more than the amount of the incumbrances can be obtained, it is equally clear the defendant Jones would receive the amount of his debt and costs, and in either case he could sustain no injury.

The only point that remains is, on what terms the sale should be directed. What is proposed is, to pay into Court 1000*l.* by way of indemnity to the defendant Jones. I think that proposition reasonable, and on that condition I shall make the order.

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*March 23rd.*

## MANNING *v.* PURCELL.

A will contained an absolute specific bequest to an individual, and a limited gift of the residue to the same individual; the Court seeing that the absolute specific bequest and the general bequest contained each a distinct and specific subject and object of gift:- *Held*, that there was an absolute specific bequest, and a limited gift of the residue.

A testator, the keeper of a tavern and betting-house, died possessed of 2049*l.*, the balance of his current account at his bankers; he was then also entitled to 2500*l.* on deposit notes of his bankers, bearing interest, payable on presentation; and he had deposited 6000*l.* with two stakeholders on a bet, which, by the rule of betting, was terminated by his death: *Held*, that these three amounts passed specifically by his will, under the denomination of "moneys."

A testator was the keeper of a tavern, fully furnished as such, in which he occasionally, but very rarely, slept; he had also household furniture at his private dwelling house, remote from the tavern, in which he resided and usually slept:—*Held*, that, though the furniture at the tavern might have formed part of the testator's stock in trade, yet, the furniture there, as well as that in the dwelling house, passed under the gift of "household furniture."

MR. MANNING, the testator, by his will dated the 13th of November, 1841, after directing the payment of his debts, disposed of his effects in the following terms:—"I give, devise, and bequeath unto my wife Elizabeth Manning all my *moneys, household furniture,* plate, books, linen, wearing apparel, &c. &c.; all the residue and re-remainder of my estate and effects whatsoever and wheresoever, both real and personal, whether in possession, or reversion, remainder, or expectancy, I give, devise, and bequeath the same unto my dear wife during the term of her natural life; and from and after her decease, I give, devise, and bequeath the same, and every part thereof, unto and among, and to be equally divided between (if any), my children, both sons and daughters."

The will contained no disposition of the residue in case the testator left no child or issue, and it did not contain any appointment of an executor.

The testator died in 1851, leaving his widow him surviving, and in March in the same year letters of administration with the will annexed were granted to the widow.

The testator left no issue.

In the year 1852, the widow married Mr. Purcell; and by a settlement made in contemplation of that marriage, all the interest of the testator's widow was assigned to trustees upon trusts for her benefit for life, with other usual trusts.

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*Statement.*

The plaintiff, who was the father of the testator, filed this bill against Mr. and Mrs. Purcell and the trustees of the marriage settlement, and against an assignee of the plaintiff's interest. The bill asked for the usual administration accounts of the testator's estate, and for a declaration by the Court that the plaintiff was entitled to one moiety of the general residuary estate, subject to the life estate given to Mrs. Purcell therein.

The Court had referred it to the Chief Clerk to take the accounts.

The Chief Clerk made his certificate in pursuance of the reference to him.

The cause now came on for argument upon a motion and cross motion in the nature of exceptions to the certificate of his Honour's Chief Clerk, seeking to vary it; and upon further consideration,

The principal questions were,—

1st. On the construction of the whole of the will, whether the clause in the will "I give, devise, and bequeath unto my wife Elizabeth Manning all my moneys, household furniture, plate, books, linen, wearing apparel, &c. &c.," was a separate specific gift of the enumerated articles to the wife absolutely, or whether it was to be treated as blended with the subsequent gift, and thus constituted an entire gift to the wife, but limited to the term of her natural life.

On this question it appeared that the testator had used a lithographed form, and that he had struck out three words, viz. "and as to" after the "&c. &c.," and before the next sentence beginning "all the residue."

2nd. Whether a balance to the amount of 2049*l.*, lying at the bankers of the testator at the time of his death, was included and passed to the testator's widow absolutely under the designation of "moneys."

3rd. Whether moneys due to the testator at the

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time of his death upon the deposit notes of the London and Westminster Bank, to the amount of 2500*l.*, bearing interest, was included and passed to the testator's widow absolutely under the designation of "moneys."

On this point it appeared that the notes were payable immediately, upon the mere indorsement of the testator and presentation of them at the bank.

4th. Whether the sum of 6000*l.*, which the testator some time prior to his decease had deposited in the hands of Messrs. Dowling and Chapman as stakeholders, and which were in their hands at the time of the testator's decease, passed to the testator's widow under the designation of "moneys."

It appeared that the testator kept a betting-office at his tavern, and that he had bet the sum of 6000*l.* to 1000*l.* on the result of a certain race; and that these two sums continued deposited with the stakeholders at the time of the testator's decease; but that, by a custom among persons who enter into such risks, the bet is terminated by the death of either party to the bet; and the stakeholders in this case, on the death of the testator, treated the bet as off, and on his widow's producing the probate of his will paid the 6000*l.* to her.

And, 5th. Whether the furniture of the tavern kept by the testator, which was fully furnished as such, was included and passed to the testator's widow absolutely under the designation of "household furniture."

With reference to this last question, it appeared that the testator had a house near King's Cross, which was his private residence, where he usually resided, and generally slept; but that he and his wife attended daily at his tavern, and that, occasionally, when they were much occupied there, they slept there, but that they did so very seldom.

*Argument.*

Mr. *Bacon*, Mr. *Renshaw*, and Mr. *Needham*, for the

plaintiff.—The plaintiff is dissatisfied with some of the conclusions of the Chief Clerk.

1st. On the plaintiff's part it is contended, that there is not, in fact, in this will, any specific gift to the testator's widow. The will is not accurately expressed, but its scope shews that the testator contemplated that he might leave children, and that he intended to give the right of enjoyment of all his property to his wife for her life, but to preserve the whole corpus for the children. It is true, that the wife's name is introduced early in the will as taking absolutely; but the last clause, introducing her name a second time, limits precisely what interest she is to take. The testator used a lithographed blank form, and he struck out the words "and as to." Now, his striking out those words indicates an intention, on the testator's part, to blend the two clauses into one; and the first clause of the will governs the whole subject of the will, and the latter clause limits the period of enjoyment by the object of the will.

This case is like *Taylor* v. *Taylor*(*a*), where the Court held, that language such as that which is used in the present case formed one gift, on the ground that there, as here, there was no division of the sentence, and that the things specifically named could not be separated from those given in general terms. If this argument prevails nothing specific is given to the wife.

But, if the Court should hold that the will contains a specific absolute disposition to the wife of the enumerated gifts, questions arise on the specific items: First, as to the balance of 2049*l.* to the credit of the current account of the testator with his bankers; that sum was not included in the word "moneys" in the will.

It must be admitted, that in some cases money lying at the bankers will pass under the gift of "moneys," as in

(*a*) 6 Sim. 249.

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*Argument.*

*Heming* v. *Whittam* (*a*), and *Hastings* v. *Hane* (*b*); but, if money at the bankers will pass, it is upon the principle that it lies there as a more convenient mode of keeping one's ready money. In *Parker* v. *Marchant* (*c*), though, under the circumstances, money at the bankers was held to pass under the words "ready money," the decision was come to on the ground that the balances in question were upon ordinary bankers' accounts, and that they were not larger than was usually kept by the testator; and the Lord-Chancellor recognised circumstances when balances at the bankers would not be included in the term ready money. A balance at the bankers is a mere debt: *Foley* v. *Hill* (*d*).

2nd. Whatever might be the decision of the Court as to the ordinary balance at the bankers, the 2500*l.* on deposit notes did not pass. In deciding the case of *Parker* v. *Marchant* the Lord Chancellor made the following observation: "It does not appear that any interest was payable upon them [the balances], or that they were subject to any limitation, restriction, or condition of any description." This passage implies, that, if interest had been payable, the balances would not have been held to be included in the term "moneys." Evidence has been adduced, the purport of which is, that, practically, the holder of deposit notes immediately on presentment receives the amount secured by them; but in law the amounts secured by them are debts which may pass as such by the transfer of the notes to other persons. If these sums are debts due to, they cannot at the same time be the moneys of, the testator.

3rd. As to the 6000*l.* received from Messrs. Chapman and Dowling, that amount was not even a debt due to the testator at the time of his death; until he had died, it was uncertain who would be the winner, the testator, or those against whom he had staked the amount; and it could in

(*a*) 2 Sim. 493.
(*b*) 6 Sim. 67.
(*c*) 1 Ph. 356, 362.
(*d*) 2 H. L. Cas. 28, 36.

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*Argument.*

no sense be called the testator's moneys. His death, according to the rule in such cases, gave his representative a right to the money, but as assets, not as ready moneys of which the testator was possessed. Even if it be admitted that the money in the hands of Chapman and Dowling was the testator's, it was a debt and not ready money; even if it be put so high as that they were agents of the testator, still the money did not pass. Thus, in *Smith* v. *Butler* (*a*), which came twice before Lord *St. Leonards* as Chancellor in Ireland, money of the testator in the hands of his salesman at Smithfield Market did not pass under a bequest of all the testator's ready money and securities for money, there being no evidence that the salesman acted as the banker of the testator.

On the above points they also referred to *Gosden* v. *Dotterill* (*b*), *Stephenson* v. *Dowson* (*c*), *Pott* v. *Clegg* (*d*), *Varney* v. *Hickman* (*e*); see also *May* v. *Grave* (*f*), and *Lowe* v. *Thomas* (*g*).

4th. As to the household furniture: the gift was satisfied by the furniture in the testator's private dwelling-house. The furniture at the tavern, being used in and for the testator's trade, did not pass: *Pratt* v. *Jackson* (*h*). The tavern was not the residence of the testator; and if he slept there it was for the purposes of his business merely.

[It appeared, that the defendant Purcell had paid various betting debts of the testator, to the amount of 2300*l*. The Chief Clerk had allowed these payments to Mr. and Mrs. Purcell in the accounts; but it was objected, that these debts were gaming debts within the provisions of the 8 & 9 Vict. c. 109, s. 18, and were not payable; and therefore that no credit should be given in the accounts

(*a*) 1 J. & L. 692; 3 Id. 565.
(*b*) 1 My. & K. 56.
(*c*) 3 Beav. 342.
(*d*) 16 M. & W. 321.
(*e*) 5 C. B. 271.
(*f*) 3 De G. & S. 462.
(*g*) Kay, 369.
(*h*) 1 Bro. P. C. 222.

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for such payments; but it became unnecessary to decide the point.]

*Argument.*

Mr. *Malins* and Mr. *C. Hall* appeared for Mr. and Mrs. Purcell.

Mr. *Wigram* and Mr. *Selwyn* were for the trustees of the settlement on the marriage of Mr. and Mrs. Purcell.

Mr. *Hanson* for an incumbrancer on the plaintiff's interest in the residue of the testator's estate.

*Judgment.*

The VICE-CHANCELLOR, after saying that he would not call on the defendants' counsel, proceeded thus:—

The first question is, whether, upon the construction of the will, the whole property is given as one mass, or whether there are, first, certain specific legacies, and then a gift of the residue. I find, on the face of the will, words of gift twice used, and twice used with reference to different objects and different subjects. The first object of gift is as to the testator's wife alone, without any mention of her children; for I find words by which he says, "I give unto my wife Elizabeth Manning all my moneys, household furniture, plate, books, linen, wearing apparel, &c." Now, there is a distinct and specific subject of the gift, and a distinct and specific object of the gift, namely, the wife; and, therefore, where you find a gift, of which the subject is clear, and the object of the gift clear, you have a complete gift of the subject itself. After those words of gift, I find that the testator goes on and says, "All the residue and remainder of my estate and effects whatsoever and wheresoever, both real and personal, whether in possession, or reversion, remainder, or expectancy, I give, devise, and bequeath the same unto my dear wife;" with a limitation to her for her life only, and to his children after her decease. This is another gift, for he begins with words which are, first, no doubt referring to the subject of the gift, but giving that subject to certain objects, not to the

wife absolutely, but only for life, and then to the children. If I find twice words of gift applying to different subjects, as I find here: first, words of gift applying to household furniture and other things specifically described, and afterwards words of gift applying to the general residue of everything, both real and personal, I must consider that there are two gifts.

It is said, that the words "all the residue and remainder," the words "and as to" being struck out, shew that there is only one general gift; and that the first words, "I give, devise, and bequeath to Elizabeth Manning," govern the whole of the sentence, and make the whole pass, so that the wife takes nothing absolutely or specifically, but takes a life estate in the whole mass of the testator's property, with remainder to her children. When he has so distinctly told us that he meant that certain specific articles should go to his wife, and then that all the residue should go to his wife only for life, and then to her children, the case seems reasonably plain as one in which I must hold that there is here a good specific legacy to the wife as her absolute property in the household furniture and other matters described in that which I hold to be a specific bequest.

The next question which arises is upon the subject matter of the specific bequest. This testator had certain transactions, in respect of which the sum of 6000*l.* was deposited in the hands of two individuals. They are described as stakeholders. How they are described seems to me of little importance, if I find that they are persons who had assets of the testator in their hands; and upon the fact that the 6000*l.* in the hands of Dowling and Chapman were assets of the testator there is no dispute. The dispute is about this, whether the 6000*l.* were moneys of the testator to pass under the specific gift of "*his money*" to his wife. If this sum was assets of the testator, what description of assets was it? It is admitted, that it was money in the

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*Judgment.*

hands of those persons, and money paid over by those persons, so as to reach the hands of the legal personal representative. This sum seems to me, therefore, to be within the description of "*his money,*" which was the subject of the specific gift; for I cannot except from a specific gift of all the testator's money anything that I find to be in the character of money in the hands of those who pay it over as money into the hands of the administrator.

That is, in my opinion, the situation of the property as to the deposit. I mention it first, because it is one of the largest subjects in dispute, and my opinion is, that it passed by the testator's description of "*his money.*"

It has been said, indeed, that it was only a chose in action, but it is a chose in action consisting of that sort of property which I cannot distinguish from money in the hands of his bankers. It was recoverable in an action, but it would be recoverable in an action for moneys had and received, just as moneys at his bankers; and upon the interpretation to be put upon the word "moneys," I cannot treat moneys which were held for the testator by persons who were bound to pay them over, and did pay them over as moneys, as otherwise than properly described by the testator as "*his moneys.*"

The question as to the next subject of gift which the plaintiffs deny to be included in the gift of moneys, is as to balances of the testator at his bankers. The testator seems to have had balances upon a current account, and balances upon a deposit account. Now the balance upon the current account certainly passed. It is also my opinion, that the money, the evidence of which was the deposit notes, also passed under the description of moneys. It has been maintained in argument, that the deposit notes are the vouchers given by the bankers with whom the deposits were made as security for money, and they have been likened to the case of money secured by a bond. It is said, that the balance due is simply a debt, and the de-

posit note is evidence of the debt, just as a bond, which shews a debt and binds the obligor to the payment of it. But, moneys deposited by a testator with his bankers, on a deposit account, the balance carrying interest, is so much money at the disposal of the testator, and is as readily accessible by him as moneys in an ordinary current account. The fact, that interest is allowed upon those deposits, is a reason for the depositor more reluctantly drawing upon his deposit account; but in point of fact, there is no distinction at all shewn to me upon the custom of the bankers. The bankers have been examined in this case, and the habit is so notorious on this, that it would not require evidence to shew that where a banker holds money for which he gives a deposit note, it is just as accessible to his customer as if it were held on a current account.

If a customer, having a balance of 10,000*l.* at his bankers, wants 1000*l.*, he must take a piece of paper and deliver it to the bankers before the bankers would pay him the money which they hold for him. Now, with respect to the deposit money, the customer, if he wants that money or any part of it, must bring the deposit receipt instead of an ordinary cheque; but that does not make it less accessible to him than if the bankers held it liable to be paid on cheques. If the slightest doubt were cast upon the accessibility of a depositor's money which a banker holds on deposit receipts, it would soon put an end to the account altogether.

My decision proceeds upon this, that, as to the deposit note, as much as to the current account, the relation of banker and customer exists; that the banker holding money of a customer, whether on a deposit account or current account, unless there is some express contract to take it out of the ordinary case of deposit, holds it as money, and as money so readily accessible to the customer on the relation of banker and customer, that it

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*Judgment.*

is held to pass under the description of money generally; and, upon that ground, I come to the conclusion, that I should put a wrong interpretation upon what the testator describes in his will as his money, if I held that he excepted from that description his money on his deposit account at his bankers, and included the moneys on his current account. Both, in my opinion, were equally comprehended in the subject of the gift. That disposes of the two more important questions, with reference to what is included in the subject-matter of the specific gift.

There remains one other matter, but much less in value and importance, and, I think, much less in difficulty.

It appears that the testator had household furniture; that he lived in a dwelling-house somewhere remote from a tavern or hotel which he occupied. It appears that he had household furniture at this tavern or hotel, and also at his dwelling-house. The plaintiff insists that the furniture of his hotel did not pass by the description of household furniture; that the household furniture at his dwelling-house does properly pass, but that his household furniture at the hotel, being part of his stock in trade, is not included in the gift of his household furniture. I must hold, that, although the household furniture at the testator's hotel may have been a part of his stock in trade, yet it was not the less in his power to make it the subject of a specific gift. I therefore think that he has very clearly and distinctly, by those words of gift to his wife, who seems to have frequented the hotel just as much as his house, given to her, as his legal personal representative, the furniture at one place as much as at the other; I have not been able to see any distinction.

These motions will best be dealt with, by a declaration to the following effect:—

Declare that the 6000*l.*, and the balance at the bankers, and the cash in their hands, were specifically given to the defendant Mrs. Purcell.

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*Judgment.*

With reference to the 2300*l.*, I do not intend to disturb the certificate, because Mrs. Purcell understood that she was entitled to the 6000*l.*, and she made the payments to the amount of 2300*l.* as payable out of that sum; and as that sum had been specifically given to her, it can be of no importance for the plaintiff further to pursue the matter; if they are treated as so much paid out of the subject of the specific gift to her, it is immaterial to consider whether they are payments properly to be allowed as against other persons interested in the testator's assets or not. If it had been necessary to decide the question, which has been argued on behalf of the plaintiff as to those payments being allowed as against the general residue, I should have felt it to be a question of very great importance. That reduces the matter to this, that the defendant Mrs. Purcell, adopting those payments as payments made by her out of the 6000*l.*, they are no longer chargeable against the general estate.

1854.

*May 2nd & 3rd.*

## COOKE *v.* WAGSTER.

A testator sold lands, and left 900*l.*, the purchase-money, in the hands of his agent, a land surveyor, to be invested on security; the agent died, and, as was supposed, insolvent, without having invested the money. The testator then, by his will, gave to his wife all his ready money and securities for money, money in the funds, and money in the bank or banks (if any) due or owing to him at the time of his decease:—*Held*, that the 900*l.* passed; and the rather because there was no gift of any residue, so that on the whole will there appeared an intention that all his property should pass, and that the words he had used should include everything, there being no other assets.

MR. PERCEVAL, the testator in the cause, made his will, dated the 29th of April, 1848, containing the following dispositions:—

"First, I order and direct my just debts, funeral and testamentary expenses, and expenses of proving this my will, to be paid by my executrix and executor hereinafter named as soon as conveniently may be after my decease. And I give and bequeath unto my dear wife Ann Perceval, all my ready money and securities for money, money in the funds, and money in the bank or banks (if any) which may be due and owing to me at the time of my decease; And also all my household goods and furniture, beds and bedding, plate, linen, china, glass, pictures, clocks, watches, books, and papers, and all household stores of every description, which I am now or may be possessed or entitled unto at the time of my decease, to and for her use and benefit absolutely." The will contained no other clause making any disposition of or affecting his personal estate.

The testator sold some houses, which were situate in Manchester, for 999*l.* Mr. Chambers, a surveyor, was his agent in the sale. He conveyed the property to the purchaser in May, 1847. Shortly afterwards the purchaser paid the 999*l.* to Mr. Chambers, by the order of the testator, who directed Mr. Chambers to receive and retain it, in order that he might invest it in any mortgage security he should approve of. Having received the 999*l.* Mr. Chambers settled accounts with the testator; and a balance of 900*l.* remained in his hands for the purposes of the investment. Mr. Chambers died in October, 1847, and the testator used to refer to this sum when he spoke of it as money in Chambers' hands. The money remained in Chambers' hands uninvested. At his death Mr. Chambers'

affairs were embarrassed, and the testator thought that the whole or nearly the whole amount was lost. The testator having made his will in April, 1848, died in July, 1848. After a suit for administering the estate of Chambers the amount had been received.

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*Statement.*

This was a suit by the personal representative of Mrs. Perceval, the widow, against the executor of the testator.

The cause came on upon a motion for a decree.

The only question in the cause was, whether the 900*l.* left in the hands of Mr. Chambers, and at the date of the testator's will and of his death due from the representatives of Mr. Chambers to the testator, passed to Mrs. Perceval under the above clause, or was entirely undisposed of by the testator's will.

*Argument.*

Mr. *J. V. Prior* and Mr. *Eddis* for the plaintiff.—The 900*l.* was the ready money of the testator during Chambers' life; and although it was not to be obtained so readily, still it did not, by the event over which the testator had no control, change its character. The observations of the Lord Chancellor in *Parker* v. *Marchant* (*a*) are quite conclusive in favour of the claim, see also *Vaisey* v. *Reynolds* (*b*); and in *Fryer* v. *Ranken* (*c*) it was held that moneys in an agent's hands passed under the words "ready money." If *Smith* v. *Butler* (*d*) should be supposed to be an authority against this claim, the answer is, that the decision was, that a floating unascertained balance in the hands of an agent is not to be considered as ready money; but the distinction there drawn is rather an authority, that in such a case as the present an ascertained balance in an agent's hands would pass. In a recent case of *Manning* v. *Purcell* (*e*), this Court held, that money in the hands of a stakeholder upon a bet passed as money.

(*a*) 1 Ph. 356.
(*b*) 5 Russ. 12.
(*c*) 11 Sim. 55.
(*d*) 3 J. & L. 565.
(*e*) See ante, p. 284.

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*Argument.*

Mr. *Charles Hall* for the executor.—The 900*l.* will not pass under the words "ready money." Even if the amount were in any sense ready money, it would have ceased to be so at the time of the testator's decease, which is the time when its state included it within or excluded it from the will. In *Gosden* v. *Dotterill* (*a*), a very leading case, it was held, that stock would not pass under the designation of "money," unless there were some explanatory context. For the same reason, the debt due from Chambers' estate will not pass. Here the testator knew, before he made his will, that Chambers was dead, and that the fund was so circumstanced as that it could not be "ready money," and there is no explanatory context indicating the testator's intention that it should pass. *Parker* v. *Marchant* (*b*) is in favour of the defendant. It is confined to a balance at a bankers, and if the bankers had failed, the uncertain amount to be received on a dividend would not be ready money. Lord *St. Leonards*, in *Smith* v. *Butler* (*c*), held, on a gift of ready money, that it would not include money in the hands of a Smithfield salesman, on whom the testator was accustomed to draw as on a banker; and said, nothing would be more dangerous than to hold that it passed; if he were so to hold he would not know where to stop. His Lordship applied this question as a test: Is it cash in hand? The debt in question cannot be so described.

Now, as to *Fryer* v. *Ranken* (*d*), cited on the part of the plaintiff, there were explanatory words which enlarged the ordinary meaning of the words "ready money;" and therefore it is not an authority when applied to this case, in which no such explanatory language occurs. In *May* v. *Grave* (*e*) the Vice-Chancellor *Knight Bruce* decided, that unreceived dividends on money in the funds did not pass

(*a*) 1 My. & K. 56.
(*b*) 1 Ph. 356.
(*c*) 3 J. & L. 565.
(*d*) 11 Sim. 55.
(*e*) 3 De G. & S. 462.

under the words "ready money." In any view of the case there was an intestacy.

Mr. *J. V. Prior*, in reply.

The VICE-CHANCELLOR:—

It is impossible for me to reconcile some of the cases which have been cited in this case with other authorities. In *Parker* v. *Marchant*(*a*) it was decided, that a balance at a bankers passed under the words "ready money." On a similar principle to that decision the Vice-Chancellor of England held, in *Fryer* v. *Ranken*(*b*), that unreceived dividends of stock due at the testator's death passed by words such as are used by this testator. It is not possible to reconcile these cases with *May* v. *Grave*(*c*), in which the Vice-Chancellor *Knight Bruce* held, that unreceived dividends did not pass under a bequest of ready money. But, after exhausting all the authorities as to where the line is to be drawn, it is the testator's will itself in each case that must be resorted to for ascertaining his intention.

In the present case, the words of the testator are remarkable; for in this will he uses the word "money" four different times in describing the several sums which he intended to pass by his will. He gives "all my ready money, and securities for money, money in the funds, and money in the bank or banks (if any) at the time of my death." The sum of money or balance due to the testator, upon which the question in this case arises, is the sum of 900*l.*, which had been in the hands of Mr. Chambers to be invested on security. Mr. Chambers having died in the testator's lifetime, this particular sum of money thus deposited with Chambers remained uninvested, and to be accounted for by Chambers' executors. Under these circumstances the sum in question is the testator's money in the hands of Chambers' executors.

(*a*) 1 Ph. 356. (*b*) 11 Sim. 55. (*c*) 3 De G. & S 462.

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*Judgment.*

It has, however, been contended, that it passed as "ready money;" but it is impossible to hold that it passed by such a bequest. My doubt, however, is, upon reading the word relied upon in support of the claim with the context, whether, upon the plain interpretation of the word "money," this money in the hands of Chambers' executors passed by this bequest. Reading the whole of the passage in which the word "money" four times occurs, I think it fairly bears the interpretation which the plaintiff's counsel put upon it. They contend with much force, that the testator intended to pass all his money, whether invested or uninvested, whether ready money or money in the funds or in the bank, or due and owing to him. It is difficult to understand what money of his he could have intended to leave undisposed of when he so frequently made use of the word "money." It may be questioned whether the words "if any" should be taken as referring to "money" or "banks;" but there is no necessity for introducing any such narrow question into the case.

When I find the testator enumerating four general descriptions of money, and when I know that the money put into Chambers' hands to be invested was not so invested through his miscarriage, I cannot bring myself to exclude the money in the hands of Chambers' executors from the gift. The great difficulty I have felt is as to the actual position of that money at the time of the testator's death. Lord *St. Leonards* decided upon a sound ground, that, under the word money, taken with the context in that case, the unsettled balance of a current account will not pass. But, in the present case, where the word is so often repeated, I think that the money in question, which was a sum certain dedicated to investment upon security, and not a floating balance of an account, passed upon the plain interpretation of the will. It is a circumstance of importance in this case, that, unless this sum was included in this bequest, the testator must have died in-

testate with regard to it, for there is no gift of the residue. The inclination of the Court, in cases of doubt, is not to favour intestacy where the intention is manifest.

1854.
COOKE v. WAGSTER.
*Judgment.*

Upon these grounds I feel myself bound to hold, that the sum due from Chambers' executors passed by the words of this will.

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## DOLLOND *v.* JOHNSON.

*June 7th.*

In a suit to administer the estate of a testator, judgments obtained against his executors are payable according to their respective dates out of legal assets.

THOMAS BINNS TURNER, the testator in the cause, on the 1st of January, 1836, gave his bond to his father Mr. Charles Turner, in a penal sum of 12,000*l.*, to secure 6000*l.* On the 30th of March, 1843, Mr. Charles Turner died, having by his will appointed the plaintiffs his executors.

After the death of Charles Turner, the testator Thomas Binns Turner paid his father's executors a sum on account of the debt secured by the bond.

On the 10th of March, 1846, Thomas Binns Turner gave his bond to his brother John Cusson Turner, in a penal sum of 4000*l.*, to secure the sum of 2000*l.*

Thomas Binns Turner died on the 22nd October, 1846, having appointed the defendant executor of his will.

On the 15th of December, 1847, the plaintiffs commenced an action against the defendant, as the executor of Thomas Binns Turner, upon his bond, upon which they recovered judgment for assets quando acciderint, which was signed on the 3rd of January, 1848, and registered in the office of the Common Pleas on the 1st of February, 1848.

On the 19th of January, 1848, John Cusson Turner commenced an action against the defendant, as executor of Thomas Binns Turner, on the bond for 4000*l.*, in which he obtained judgment, and signed it on the 13th, and registered it at the Common Pleas on the 14th of March, 1848.

On the 29th of June, 1848, the plaintiffs, as specialty

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creditors of Thomas Binns Turner, filed their bill in this Court on behalf of themselves and of all other creditors, to administer the estate of the testator.

*Statement.*

On the 8th of July, 1848, the cause came on to a hearing, when the usual references were made to the Master. On the 23rd of November, 1853, the Master made his report, by which he found that there was due from the estate of Thos. Binns Turner to the plaintiffs, in respect of the bond debt, interest, and costs of the judgment of the 3rd of January, 1848, the sum of 7128*l.* 18*s.* 2*d.* The Master further found, that, in compliance with the advertisements inserted by him in the London Gazette, other specialty and simple contract debtors had come in and proved debts to the amount of 12,932*l.* 13*s.* 9*d.*

On the 18th of March, 1854, the cause came on for further consideration; when a question was raised whether the judgment debt of the plaintiffs was entitled to priority over the judgment recovered by John Cusson Turner on the 13th of March, 1848.

*Argument.*

Mr. *Wigram* and Mr. *Leach* for the plaintiffs.—It was the well-established principle of this Court that the creditor who had been most diligent should have priority. *Ashley* v. *Pocock*(*a*) determined that the executor ought to have first paid the creditors who had used the first diligence.

The question was, in fact, decided in *Morrice* v. *The Bank of England*(*b*), where the decree directed that the assets should be applied to the payment of the several judgments according to their priority. The same principle was acted on in the case of *Abbis* v. *Winter*(*c*). The principle upon which the priority was to be determined in this Court was the same as at law; and it was no objection in such a case that the question had to be decided in a Court of equity: *Whitaker* v. *Wright* (*d*). It was immaterial whether the

(*a*) 3 Atk. 208.

(*b*) 3 Swanst. 585; Cas. temp. Lord Talbot, 212; 8 octavo ed. Brown Parl. Cas. ed. Toml. p. 465.

(*c*) 3 Swanst. 578.

(*d*) 2 Hare, 310.

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*Argument.*

assets came to the executors' hands before or after the decree: *Nunn* v. *Barlow* (*a*).

The following cases were also cited:—*Joseph* v. *Mott*(*b*), *Rowe* v. *Bant*(*c*), *Macreth* v. *Jackson*(*d*), *Perry* v. *Phelips* (*e*), *Gaunt* v. *Taylor* (*f*), and *Larkins* v. *Paxton*(*g*).

Mr. *Faber* appeared for the second judgment creditor, and contended, that, in this Court, both judgments were payable rateably.

Mr. *Bird* appeared for the executor, and called the attention of the Court to the cases of *Hancocke* v. *Prowd*(*h*), and *Parker* v. *Atfield* (*i*).

The VICE-CHANCELLOR:—

*Judgment.*

This is a creditors' suit, by the plaintiffs, Dollond and Huggins, on behalf of themselves and all other creditors, for the administration of the assets of the testator Turner.

The plaintiffs, after the death of the testator Turner, recovered judgment against the defendant, his executor. Afterwards Turner, another creditor, also recovered a judgment against the executor. The question is, whether these two creditors, who have both obtained judgments against the executor for assets *quando acciderint*, are to be paid rateably, or whether the plaintiffs, whose judgment is prior in point of date, are entitled to payment in preference to the other, whose judgment is later in date?

For the plaintiffs it has been argued, on the authority of the case of *Morrice* v. *The Bank of England*, reported in 3 Swanst., and also Cas. temp. Talbot, p. 217, as well

(*a*) 1 S. & S. 588.
(*b*) Prec. Chanc. 79; Williams on Executors, p. 890.
(*c*) 1 Dick. 150.
(*d*) 1 M. & Selw. 408, n.
(*e*) 10 Ves. 33.
(*f*) 3 Man. & G. 886.
(*g*) 2 Beav. 219.
(*h*) 1 Saund. 328.
(*i*) 1 Salk. 311.

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as on the authority of other cases, that they had obtained a right to priority of judgment by reason of the prior date of their judgment. This right of priority is said to accrue as the reward of the greater diligence of the party who can first obtain judgment. A still higher degree of diligence would have been shewn by obtaining judgment against the testator in his lifetime. But it is admitted, that, as to all judgments obtained against the testator in his lifetime there can be no priority, but all must be paid rateably. It is not easy to see how the plaintiffs' claim to priority, on the ground of diligence against the executor, which would have had no effect if exercised against the testator, can prevail.

The authorities, however, shew that it has been the practice of the Court to recognise this right of priority as to judgments obtained against an executor. In *Morrice* v. *The Bank of England* the decree directed the payment of the judgment debts according to their priority of date. On the same principle, in the case of *Abbiss* v. *Winter*, a similar priority is recognised as to decrees against the assets at the suit of individual creditors, which are held to bind the assets according to date, and to have priority accordingly. In the present case, the decree is on behalf of all the creditors; but, in addition to the plaintiffs' diligence in first obtaining judgment against the executor for their own debt, they were most diligent in obtaining the decree of this Court for the general administration.

The question is concluded by authority. I am bound to hold, and I do so with reluctance, and only because bound by the authorities, that the plaintiffs' judgment is payable in priority to that of the other judgment creditors. Lord *Hardwicke* said, in the case of *Morrice* v. *The Bank of England*, that it would be more agreeable to natural equity and justice to have the assets distributed pro ratâ; and that he considered it a defect in the law, that it should not be in the power of a Court of equity or of a

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Court of law to enforce a distribution of assets *pro ratâ* among the creditors without consent. Nevertheless, Lord *Hardwicke* did not feel himself authorised to remedy this defect in the law. And as I believe there is no case in which the course adopted by him in this respect has not been followed, I am bound by authority, but with regret, to recognise that priority which is sanctioned by the law of this Court.

## POWDRELL *v.* JONES.

*June 10th.*

THIS was a motion on behalf of the defendant Richard Parry Jones, that the certificate of his Honour's Chief Clerk might be varied, by substituting in the schedule of specialty debts the sum of 11,064*l.* 10*s.* 5*d.*, as due to the said defendant, instead of the sum of 5000*l.* therein stated to be due to the defendant as a specialty creditor of the testator by virtue of the partnership articles, dated the 26th of May, 1843, and by expunging from the schedule of simple contract debts the sum of 6064*l.* 10*s.* 5*d.*, being the balance beyond the amount of 5000*l.*

A cross motion was also made to vary the certificate, so far as it allowed the 5000*l.* to the defendant Jones as a specialty debt.

The bill was filed by Richard Powdrell on behalf of himself and all other the creditors of George Harper, deceased, and it prayed that his estate might be administered in this Court.

By articles of partnership, dated the 26th of May, 1843, made between George Harper and the defendant R. P. Jones, they agreed to carry on business together at Whitchurch in Salop, as solicitors.

Articles of partnership under seal, containing the usual covenant by the partners to be true and just to each other in all their dealings, and by which each bound himself, his executors, &c. unto the other, his executors, &c. in the penal sum of 5000*l.* for the due performance of the partnership articles—on the death of one partner, he was found indebted to the partnership in 11,064*l.*: —*Held*, that the debt was by specialty for 5000*l.* only, there being no covenant or obligation in the deed for payment of the general balance on the settlement of the partnership accounts, but only for 5000*l.*; the express contract for a definite sum excluding any implication for a larger sum as a specialty debt.

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*Statement.*

The articles contained several stipulations, which were as follows:—

"That, in case either partner should advance for the partnership business any sum exceeding in amount what should have been advanced by the other partner, such excess should be repaid with interest at 5*l.* per cent.

"That the rent &c. should be paid out of the profits.

"That the said Jones on his own behalf, and the clerk on behalf of the said George Harper, should make entries of moneys received on account of the said partnership.

"That the said partners respectively shall be true and just to each other in all their contracts, reckonings, receipts, payments, and dealings.

"That, in the event of the death of one of the partners, the managing clerk, after deducting expenses, should pay the debts when recovered to the surviving partner and the executors of the partner deceased.

"Lastly, each of them the said George Harper and R. P. Jones did thereby bind himself, his heirs, executors, and administrators, unto the other of them, his executors, administrators, and assigns (*a*), in the penal sum of 5000*l.* of lawful money of Great Britain, for the due performance of all and every the covenants, articles, and agreements hereinbefore contained, which by them respectively are and ought to be observed, performed, and kept, according to the true intent and meaning of these presents."

Harper and the defendant Jones continued to carry on the business of solicitors until the partnership was terminated by the death of Harper on the 26th of September, 1851. By his will he appointed his partner Jones his executor.

The bill was shortly after filed to administer Harper's estate, and the cause came on for hearing. On the 30th of

(*a*) Sic. in orig.

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May, 1853, an account was directed (inter alia) of what was due from the testator's estate in respect of specialty debts. Also of what was due to or from the testator's estate from or to the defendant Jones in respect of the partnership.

*Statement.*

The Chief Clerk certified, that, on taking the accounts, the debts due from the partnership amounted to 10,233*l.* 17*s.* 9*d.*, and the partnership assets were only 6517*l.* 17*s.* 11*d.*, leaving a deficiency of 3715*l.* 19*s.* 10*d.*; that Mr. Harper had received the sum of 14,207*l.* beyond the sums paid by him to the partnership account; and that the defendant Jones was in advance in a sum of 2065*l.* 8*s.* 3*d.*

The Chief Clerk further certified, that, after making certain deductions, Mr. Jones was a creditor on the assets to the extent of 11,064*l.* 10*s.* 5*d.*, and that, as to the sum of 5000*l.*, he was a specialty creditor; and, as to the balance of 6064*l.* 10*s.* 5*d.*, he was a simple contract creditor against the estate of Harper.

The case now came on, on two motions, one by the defendant Jones, objecting that the Chief Clerk ought to have allowed the whole debt as specialty. The cross motion was by the plaintiff, who contended that the Chief Clerk had improperly allowed any part of the debt as specialty.

*Argument.*

Mr. *Wigram* and Mr. *C. Hall*, on behalf of the defendant Jones.—The defendant Jones, as executor of Harper, is entitled to retain the amount of damages sustained by a breach of covenant: *Loane* v. *Casey* (*a*).

That this was a debt by covenant to the extent of 5000*l.* could hardly be disputed. In *Musson* v. *May* (*b*), where a continuing partner covenanted to pay the debts, but died before such debts were satisfied, which were ultimately paid by the retiring partner, it was held that the latter was a specialty creditor to the amount of the debts

(*a*) 2 W. Black. 965. (*b*) 3 V. & B. 197.

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paid by him; and it was held, that it was no objection that the damages were unliquidated. Whenever a debt arose by reason of a breach of covenant it was a specialty debt: *Mayor* v. *Davenport* (*a*), *Turner* v. *Wardle* (*b*), *Wood* v. *Hardisty* (*c*).—*Beckham* v. *Drake* (*d*) was also cited.

Mr. *Malins* and Mr. *Kenyon*, for the plaintiff, contended that the certificate of the Chief Clerk was erroneous, in treating any part of the debt due from Mr. Harper as a specialty debt. The testator had broken no covenant contained in the deed of partnership. The sum of 5000*l.* was a mere penalty, which was not payable unless there was a breach of covenant; but it was no breach of covenant in Harper to become indebted to the partnership. One partner, it was true, was not to withdraw the capital; but, to become a debtor to the partnership was not to withdraw capital. At all events, what was done was clearly done with the acquiescence and consent of the other partner. If Jones was a specialty creditor, he would have been able to maintain an action for the excess of the amount received on account of the partnership, which it is quite clear he could not: *De Tastet* v. *Shaw* (*e*).

His Honour said, he felt no doubt, that, as to 5000*l.*, Jones was a specialty creditor; but, as to the residue of the debt, he reserved his judgment, which he subsequently delivered on the 10th of June.

*Judgment.*

The VICE-CHANCELLOR:—

The testator carried on business in partnership with Mr. Richard Parry Jones; and the Chief Clerk has certified that there is due from the testator's estate to Mr. Parry Jones in respect of the partnership a balance of 11,644*l.* 10*s.* 5*d.*; and that 5000*l.*, part of this balance, is a specialty debt, by

(*a*) 2 Sim. 227.
(*b*) 7 Sim. 80.
(*c*) 2 Coll. 542.
(*d*) 2 H. L. Cas. 579.
(*e*) 1 B. & Ald. 669.

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virtue of the articles of partnership. It has been contended, on behalf of Mr. Jones, that the whole amount of the balance ought to have been certified to be a debt by specialty. On the other hand, it has been contended that no part of the debt is due on specialty; not even the 5000*l.* The partnership articles are under seal; Mr. Jones, therefore, insists that the balance on the adjustment of the partnership accounts, that is, his proportion of the residue on the balance of the accounts, is due to him by virtue of transactions arising on an obligation under seal, and ought, therefore, to be admitted to proof as a specialty debt.

The partnership articles contain no covenant by either partner for payment of the balance due on any settlement of the partnership accounts. There are stipulations, that they are to be interested in equal shares in the capital and profits; that, if either shall be in advance for the partnership to an amount exceeding what shall have been advanced or paid by the other, he shall be entitled to repayment, with interest at 5*l.* per cent. per annum, before any division of profits; that they will be true and just to each other in all their contracts, reckonings, receipts, payments, and dealings. And at the end of the deed there is an obligation in the form of a bond, by which they are bound to each other in the penal sum of 5000*l.* for the due performance of all and every the covenants, articles, and agreements therein contained.

There being no express covenant for the payment of the balance on adjusting the partnership accounts, the right to that balance arises from the relation constituted by the articles of partnership. One of the consequences of the relation of partners constituted by deed under seal is, that neither of the contracting partners can bring an action against the other. It is said, however, that the deed which creates this incapacity to sue at law constitutes a specialty debt for the general balance on the result of the partnership accounts. None of the cases

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cited at the bar support this view—and it would be a strange thing if they did. The right to recover the balance due on the result of the partnership accounts accrues under the equity, which was said by Lord *Eldon*, in the case of *Paynter* v. *Houston* (*a*), to make the executor of a deceased partner an equitable creditor or debtor to the surviving partner. This equity arises from the relation of partner, and not from express obligation. The mere fact that the relation arises from a contract under seal to constitute that relation, seems something short of what is required to make a debt by specialty.

Unless the deed expressly binds the debtor to payment by containing an express obligation to pay it, it does not constitute a debt. These articles, however, do constitute the relation of debtor and creditor expressly, and for an amount exactly defined. Whether that amount might or might not be the sum due to either upon the balance of accounts, the contract is express as a specialty debt for a definite sum.

This express contract as to the amount of debt under specialty excludes any implication by which that amount can be enlarged as a specialty debt. The payment of the general balance due on the partnership accounts is one of the duties for the due performance of which the obligation in the penal sum of 5000*l.* is expressly contracted; and as that duty has not yet been performed towards Mr. Jones, and the balance due to him exceeds the amount stipulated by the bond, he has been rightly certified to be a creditor by specialty for that amount. But for so much as is due to him beyond the penal sum of 5000*l.* it is recoverable merely as a general balance arising from the relation of partner, the payment of which is not secured by any express obligation under seal, and it therefore cannot be treated as a specialty debt.

(*a*) 3 Mer. 297.

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## COAPE *v.* ARNOLD.
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*March 4th,*
*May 27th.*

GEORGE ARNOLD, of Ledgers Ashby, in the county of Northampton, by his will, dated the 14th of May, 1794, after making certain dispositions immaterial to the present question, devised as follows:—

Devise of real estate to G. H., testator's eldest son, for ninety-nine years, if he should so long live; remainder to trustees and their heirs for G. H.'s life, in trust to support contingent remainders; remainder to the heirs of the body of his said son; and, for want of such issue, remainder to his second son, for ninety-nine years, &c. By a codicil, the testator devised his real estate to trustees in trust for sale:—*Held*, that the heirs of the body of G. H. took by purchase, and that no equitable freehold resulted to G. H., so as to attract the operation of the rule in *Shelley's case*, and create an estate tail in him.

"And, as to all the rest of my real estates situated within the county of Warwick and the county of the said city of Coventry, or elsewhere within the kingdom of Great Britain, which I have power by this my will to dispose of, I devise the same, chargeable with any mortgage or mortgages which now do or hereafter may affect the same, unto my eldest son George Henry Arnold, for the term of ninety-nine years, and in case he shall so long live; and subject to the said term I devise the same unto Henry Hoare, of Mitcham, in the county of Surrey, Esq., and Thomas Gilbert, of Collin, in the county of Derby, Esq., and their heirs, during the life of my son, in trust only to support the contingent remainders hereinafter limited, and after the determination of the said estates, then I give all the said hereditaments and premises, subject as aforesaid, unto the heirs of the body of my said son George Henry Arnold; and for want of such issue I devise the same, subject as aforesaid, unto my second son Edward Richard John Arnold, for the term of ninety-nine years, if he shall so long live; and, subject to the said term, I devise the same unto the said Henry Hoare and Thomas Gilbert, and their heirs, during the life of my said son E. R. J. Arnold, in trust only to support the contingent remainders thereinafter limited; and from and after the determination of the said estates, then I devise the same unto the heirs of the body of my said son E. R. J. Arnold."

The testator then, in default of such issue, devised the same to his wife if she remained unmarried, and in case of

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her death or marriage as his eldest son should appoint, and in default of appointment by his eldest son, as his second son, and in default thereof, as his wife, should appoint. The testator also gave each of his sons power to jointure and raise portions for the younger children not exceeding amounts specified in the will. There was an ultimate fund in favour of Edward Morrison and his heirs for ever.

By a codicil, dated the 27th of June, 1806, the testator devised to his wife Henrietta Jane Arnold, Henry Peters, Henry Hoare, and Lieutenant-General Edward Morrison, all his "freehold and copyhold estates, situate in the parishes of Ledgers Ashby, in the said county, &c., or elsewhere in the kingdom of Great Britain, to hold the same to the use of Henrietta Jane Arnold, Henry Peters, Henry Hoare, and Edward Morrison, their heirs and assigns, for ever, upon trust that they the said Henrietta Jane Arnold, Henry Peters, Henry Hoare, and Edward Morrison, or the survivor of them, his or her heirs or assigns, do and shall, with all convenient speed after my decease, by such conveyances as counsel shall advise, convey and assure, unto the trustees named in the articles made previously to my marriage, such part and so much of the said estate as they in their discretion and of their own proper authority shall think fit, and, together with the provisions in the said articles mentioned or referred to, will make up the yearly rent-charge or sum of 1200*l.* as the jointure for my dear wife Henrietta Jane, to be paid at the time and in manner in the said articles mentioned. And I hereby empower my said trustees to sell, convey, and exchange, or to mortgage all or any part of my said estates. And I declare that their receipts shall be sufficient discharges to purchasers and mortgagees, who shall not be bound to see to the application of the purchase or mortgage monies.

"I hereby charge and make chargeable all and singular my said estates with the payment of my just debts, and particularly of all such sums of money, as, by the permission of John Caldecott, Esq., I have received from all or any of my trust estates, and which are unaccounted for by me to him. In witness, &c."

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*Statement.*

The testator made a second will, dated in 1806, which was inoperative as to the realty, and died in October, 1806, having had no children by his first wife, but leaving three sons, George Henry Arnold, his eldest son and heir-at-law, Edward Richard John Arnold, and James William Arnold, his only other children.

George Henry Arnold died in October, 1844, leaving one daughter, Georgiana, who intermarried with William Coape, since deceased and is the mother of the infant plaintiff. In 1836 he executed a disentailing deed, and subsequently devised the estates to the defendant.

The bill in the first suit was filed on the 10th of November, 1851, by Henry Frazer, James Coape, the infant son of Georgiana, only child of George Henry Arnold, by James Coape, his father, as his next friend, claiming to be entitled to certain estates in the counties of Northampton and Warwick, of which George Henry the testator died seised, under the limitations contained in his will. The second suit was instituted on the 12th of July, 1852, by the defendants in the original suit, claiming to be entitled to the same estates, by virtue of the disentailing assurance executed by George Henry Arnold, and also claiming an estate called the Mirrables, in the Isle of Wight. To this cross bill the plaintiff in the original suit demurred; and the demurrers were ordered to come on with the cause at the hearing.

*Argument.*

Mr. *Wigram*, Mr. *Toller*, and Mr. *Chapman Barber* for the plaintiff in the suit of *Coape* v. *Arnold*.—The codicil, by converting both the particular estate and the resulting trust into equitable estates, has let in the question, whether the disentailing assurance, executed by George Henry Arnold in his lifetime, had the effect of defeating the estates tail created by the will of his father George Arnold.

It was important to notice, that the codicil begins by confirming the will, and cannot therefore be taken as intending to make a new disposition of the estates.

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*Argument.*

It is to be observed at the outset, that the testator, to use a familiar expression, was "his own conveyancer;" he has left nothing to be done; and if a Court of Equity were now directing a conveyance to be made to the trustees, it would direct it to be made to the uses of the will, which would give beyond a doubt an estate tail by purchase to the heirs of the body of George Arnold. If therefore the Court were to hold that George Henry Arnold effectually barred the estate tail, it would clearly be in violation of the intention of the testator. It must be borne in mind, that the rule in *Shelley's case*, to borrow the language of Lord *Mansfield* (*a*), "is not a general proposition subject to no control, where the intention is on the other side, and where the objection may be answered." The testator has made his son George Henry a termor, and has carefully abstained from giving him an estate for life. It is clear, the moment he becomes an equitable freeholder, he ceases to be a termor.

In this case, if the resulting interest were held to unite with the limitation, the effect would be dependent on the event. If George Henry Arnold had died during the testator's life, there could have been no union, so that the limitation would take effect one way or other, according to circumstances. *Pibus* v. *Mitford* was free from that objection. Of the intention of the testator to exclude George Henry from an estate tail there could be no doubt. The question then was, whether, by operation of law, George Henry took such an estate in the property as under the rule in *Shelley's case* enabled him to acquire the fee.

There was no case in which the question had arisen how far a resulting interest to the heir-at-law would unite with a limitation to the heirs of his body. In *Hopkins* v. *Hopkins* (*b*), a question was raised, whether a resulting trust to the heir for a determinable freehold would support contingent remainders, but the point was not decided. The rule, how-

(*a*) *Perrin* v. *Blake*, 4 Burr. 2579; Preston on Estates, 272; 1 Collectanea Juridica, 320.

(*b*) 1 Atk. 588, 595-6; Fearne, 72.

ever, as commonly received, required that both estates should arise upon the same instrument.

It was true, that, in the case of *Pibus* v. *Mitford* (*a*), the Court held that the rule in *Shelley's case* applied, although there the only life estate arose by implication; but in that case there was no limitation of the use during the covenantor's life, which the Court thought could not have been the intention, and therefore supplied the defect. But, in *Southcot* v. *Stowel* (*b*), where the grantor had limited a present use to his son in tail, the Court refused to allow an estate for life in the grantor by implication, and doubted the doctrine laid down in *Pibus* v. *Mitford*.

In *Adams* v. *Savage* (*c*), where the use was limited to the grantor himself for ninety-nine years, remainder to the use of the trustees for twenty-five years, remainder to the use of the heirs male of the body of the grantor, the limitation to the heirs male of the body was held to be void for want of a preceding freehold, which the Court refused to imply contrary to the intent of the conveyance. There was in that case an express estate limited to the grantor, which the Court held to be incompatible with an estate by implication; and *Powell*, J., observed, that, if that circumstance had existed in *Pibus* v. *Mitford*, it might have been different. In *Rawley* v. *Holland* (*d*), where the settlor conveyed lands to the use of himself for ninety-nine years if he so long lived, and after to the use of trustees for 200 years, remainder to the use of the heirs male of his own body, remainder to his own right heirs, the limitation to the heirs male of his body was held void for want of a preceding estate of freehold, which the Court held could not result to the grantor for his life by implication, because another estate, viz. for ninety-nine years, was expressly limited to him, and was inconsistent with an estate by implication.

(*a*) 1 Vent. 372; Fearne, 41.

(*b*) 1 Mod. 226; Fearne's C. R. 44.

(*c*) 2 Salk, 679; Fearne, 42; 2 Ld. Raym. 851.

(*d*) 22 Vin. Ab. 189, pl. 11; Fearne's C. R. 42.

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In *Tippin* v. *Cosin* (*a*), where an express estate was limited to the conusee in the fine during the life of the grantor, the Court held there was no room for implication. In *Else* v. *Osborn* (*b*), where the settlor made a settlement to the use of himself for ninety-nine years if he should so long live, remainder to trustees and their heirs during his life, remainder to the use of the heirs of his body, remainder to himself in fee, Lord Chancellor *Cooper* held, that, by the limitation to the heirs of his body, the latter would take by purchase. It was almost impossible to distinguish between that and this case.

The doctrine to be deduced from these authorities is clearly this,—that, where as here an express estate is given, no other estate can arise by implication. This view is supported by Mr. Fearne (*c*), the ablest text writer on this subject.

The following case was also cited: *Nouaille* v. *Greenwood* (*d*).

Mr. *Malins*, Mr. *Rogers*, and Mr. *Boyle* for the defendant. —The decided case that most closely resembles that now before the Court is *Pibus* v. *Mitford* (*e*), "where so much of the use as was undisposed of by the owner of the land," to borrow the language of Lord Coke (*f*), "was held to remain in him," and the covenantor, not having disposed of the estate for his own life, it was held he took an estate for life by implication. This doctrine in some of the books is sought to be supported on the ground of intention, but it is difficult to understand what other conclusion could have been adopted without contravening a rule of law which admits of no exception, that the freehold cannot be in abeyance.

Between an estate implied on the ground of intention, and one arising by operation of law, there is a distinction, the long neglect of which has led to the contradiction ap-

(*a*) Carth. 272; 4 Mod. 380; Fearne's C. R. 43.
(*b*) 1 P. Wms. 387.
(*c*) Page 49.
(*d*) 1 T. & R. 26.
(*e*) 1 Vent. 372.
(*f*) 1 Inst. 23.

parent among the authorities. No doubt, the non-disposition by the owner of any part of his estates, in which case it would remain in him or result to him, and the intention to retain or at least the absence of any intention to alienate it, are for the most part coincident, but they are nevertheless totally distinct things, and are subject to different rules. Thus, in numerous cases, the Court has held that no estate can be implied upon the ground of intention, where, under the same instrument, an express estate has been limited. There is, however, no case in which the question, having been specifically raised, the Court has held that an estate arising by operation of law can be defeated upon the ground of intention.

It is contended, that the case of *Else* v. *Osborn* (*a*) is an authority to govern this case, but there is no analogy between them. In that case the only question raised was, whether the limitation to the heirs of the settlor's body was, as it was held to be, a contingent remainder. In that case the settlor made a settlement to the use of himself for ninety-nine years, if he should so long live, remainder to trustees and their heirs during his life, remainder to the use of the heirs of his body, remainder to himself in fee. There was in that case no question of the application of the rule in *Shelley's case;* but even were it otherwise, and the Court had decided against the application of the rule, that decision could be no guide here. In *Else* v. *Osborn* there were only legal limitations, and the only legal estate vested in the settlor was of a chattel description. It was true, the equitable freehold as here must have resulted to him, but that could not unite with the legal limitation to the use of the heirs of his body.

Then come the cases of *Adams* v. *Savage* (*b*), and *Rawley* v. *Holland* (*c*). It is to be observed, that these cases are decisions, not so much that the freehold undisposed of by

(*a*) 1 P. Wms. 387; Fearne's C. R. 44 (Butler's edit.).

(*b*) 2 Salk. 679.

(*c*) 22 Vin. Ab. pl. 189.

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*Argument.*

the deeds did not result to the grantor, as that because there was no preceding freehold limited to support the contingent remainder they were void. It is contended, however, that these decisions are both unsatisfactory, because they are inconsistent upon the face of them, and also because they are in violation of a well-settled rule of law.

The reasons assigned are, that no estate can arise by implication, because one is expressly limited by the instrument. An express limitation in a deed may be enough to negative any intention on the part of the grantor to limit a second estate in the same channel, but it cannot avail to defeat an estate arising by operation of law.

The cases are inconsistent upon the face of them, because they decide that the remainder was void for want of a preceding freehold limited to support it. It is clear, therefore, that if they decided that no life estate resulted to the grantor, they decided also that the freehold estate was not in the trustees; where the freehold during the life of the grantor was to be found, is not suggested.

It is clear the decision in *Adam* v. *Savage* was unsound, because the limitation was at all events good (*a*) as a springing use.

In fine, it was submitted, that the legal estate in fee being by the codicil vested in trustees for the benefit of George H. Arnold for ninety-nine years, and to preserve contingent remainders, and after his decease in trust for the heirs of his body, the trustees took no beneficial freehold interest during his life. To whom, then, could the resulting beneficial freehold interest pass but to the heir, *i. e.* George Henry? He had necessarily an equitable beneficial interest for his life, which, under the rule in *Shelley's case*, united with the limitations to the heirs of his body, and gave him an estate tail. It was not denied, that the rule in *Shelley's case* applied equally to equitable as to

(*a*) 1 Saund. 142—148.

legal estates, to estates taken as well by construction or implication as by express gift to the ancestor, to estates mediate or immediate, with or without intervening estates tail or otherwise limited to other persons, between the estates vesting in the ancestor and those limited to the heir. There may be some inconsistency among the authorities, but to dispute in this case that the equitable beneficial freehold resulted to George Henry and united with the equitable remainder, would be to overthrow the well-established rules of law.

The following cases were also cited:—*Lachton* v. *Adams* (*a*), *Robinson* v. *Robinson* (*b*), *Thong* v. *Bedford* (*c*), *Hayes* v. *Foorde* (*d*), *Legate* v. *Sewell* (*e*), *Jones* v. *Morgan* (*f*), *Pierson* v. *Vicker* (*g*), *King* v. *Dennison* (*h*), *Hobart* v. *Countess of Suffolk* (*i*), *Lowe* v. *Davis* (*k*), *Heale* v. *Greenbank* (*l*), *Brydges* v. *Brydges* (*m*), *Roberts* v. *Dixwell* (*n*), *Douglas* v. *Congreve* (*o*), *Wright* v. *Pearson* (*p*), *Jervoise* v. *Duke of Northumberland* (*q*), and *Duncomb* v. *Duncomb* (*r*); also Preston on Estates, 365; Jarman on Wills, vol. 1, pp. 502—504; Dyer, 111—116; Co. Litt. 24, n. 3, Butler's ed.

Mr. *Wigram* in reply.—There was no inconsistency between *Pibus* v. *Mitford*, *Rawley* v. *Holland*, and *Adams* v. *Savage*, as had been shewn by Mr. Fearne. It might be, that, in the latter case, the limitation was good as a springing use, but the fact was, that at the time the decision was pronounced the doctrine of springing uses was not fully established.

If the view contended for by the other side was to be

(*a*) 5 L. J. (N. S.) 382.
(*b*) 2 Ves. 225.
(*c*) 1 Bro. C. C. 313.
(*d*) 2 W. Bla. 698.
(*e*) 1 P. Wms. 87.
(*f*) 1 Bro. C. C. 206.
(*g*) 5 East, 548.
(*h*) 1 V. & B. 272.
(*i*) 2 Vern. 644; 1 Eq. Ca. Abr. 272.
(*k*) 2 Ld. Raym. 1561.
(*l*) 3 Atk. 716.
(*m*) 3 Ves. 120.
(*n*) 1 Atk. 607.
(*o*) 1 Beav. 59.
(*p*) 1 Eden, 119.
(*q*) 1 J. & W. 573.
(*r*) 3 Lev. 437.

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*Argument.*

adopted, and George Henry was equitable tenant for life, there must have been a merger, because a man could not be both equitable termor and equitable freeholder at one and the same time. But this was not contended.

The following authorities were cited:—*Gore* v. *Gore* (*a*), *Wills* v. *Palmer* (*b*), and *Garth* v. *Baldwin* (*c*); Fearne, Cont. Rem. 20, note by Butler.

*Judgment.*

The VICE-CHANCELLOR:—

The question in this case is, whether, under the will and codicil of the testator George Arnold, his eldest son and heir-at-law George Henry Arnold, took an estate tail by the operation of the rule in *Shelley's case*.

The testator devises his real estates to his eldest son George Henry Arnold, for ninety-nine years, in case he should so long live, and, subject to this term, to trustees and their heirs during the life of his said son, in trust only to support contingent remainders; and from and after the determination of the said estates, subject as aforesaid, to the heirs of the body of his said son George Henry Arnold, and, for want of such issue, subject as aforesaid, to his second son Edward Richard John Arnold, for ninety-nine years if he should so long live; and, subject to the said term, to the same trustees and their heirs during the life of his said son Edward Richard John Arnold, in trust to support the contingent remainders thereinafter limited; and, from and after the determination of the said estates, to the heirs of the body of his last-named son; and for want of such issue to the heirs of his own (the testator's body), and for want of such issue to the testator's wife during widowhood, and after her death or marriage again to such person and for such estates as his son George Henry Arnold should by deed or will appoint; and after similar powers of appointment successively to his other sons and to his widow, with the ultimate remainder to Edward Morrison, his heirs and assigns, for ever. By a codicil to this will, after

(*a*) 2 P. Wms. 28.
(*b*) 5 Burr. 2615; 2 Bla. 687; Fearne's C. R. 44.
(*c*) 2 Ves. sen. 645.

confirming the will, he devises all his freehold and copyhold estates to his wife and three other persons as trustees, to the use of them in fee, upon trust, immediately after his decease, " to convey to the trustees of his marriage articles such part of his estates as his trustees in their discretion should think fit, and as, with the estates comprised in his marriage articles, would make up the jointure of his wife to 1200*l.* per annum; and he thereby empowered his trustees and the survivors of them, their heirs and assigns, to sell and exchange or to mortgage any part of his estates, and declared that their receipts should be sufficient discharges; and he charged all the said estates with the payment of his just debts."

Under this will and codicil the plaintiff Coape claims to be now entitled as equitable tenant in tail. The testator's son George Henry Arnold, to whom the estates were devised for ninety-nine years if he should so long live, had a daughter, Georgiana, who married James Coape, and was the mother of the plaintiff, who is therefore heir of the body of George Henry Arnold. According to the plaintiff's construction, George Henry Arnold being devisee for ninety-nine years if he should so long live, with remainder to trustees and their heirs during the life of George Henry to preserve contingent remainders, with remainder to the heirs of the body of George Henry Arnold, this devise to the heirs of George Henry was a contingent remainder, under which the plaintiff claims as tenant in tail.

The defendant, however, claims the estates under George Henry Arnold, on the ground that George Henry Arnold was tenant in tail, and had thereby been enabled to acquire the fee simple. It is admitted by the defendant's counsel, that, under the will, and but for the operation of the codicil, —and if the case stood merely on the will—the devise to the heirs of the body of George Henry must be construed as a contingent remainder, giving an estate in tail general by purchase to the daughter of George Henry, and that the plaintiff's title must prevail.

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But it has been argued that the effect of the codicil being to vest the whole fee simple of the legal estate in trustees, and so to make all the limitations in the will effective only as giving equitable estates, the devise to the heirs of the body of George Henry being of an equitable estate, the rule in *Shelley's case* makes it coalesce with the equitable freehold, which is said to have resulted to him for his life. On the construction of the will the legal estate during the life of George Henry being given to the trustees, it was said that the freehold resulted to him as an equitable estate, and could not unite with the legal devise to the heirs of his body; but the codicil having made the devise to the heirs of the body an equitable estate, the resulting equitable freehold united with it, and made George Henry equitable tenant in tail.

Unless it can be shewn that an equitable estate of freehold resulted to George Henry, to whom the estates were devised for ninety-nine years if he should so long live, the case of the defendant must fail. As there is an express devise of the beneficial interest to George Henry for ninety-nine years if he should so long live, if an equitable freehold resulted to him by operation of law, the codicil having made all the devises in the will equitable estates, either the term for ninety-nine years must be merged in the resulting freehold, or George Henry must have had two equitable estates co-existing in him, one for the term of ninety-nine years if he so long live, the other the freehold said to result by operation of law.

There are difficulties in holding, consistently with decided cases, that the freehold can result by implication to the heir to whom an express estate is given for a term of years. Mr. Fearne's exposition of the law as to no estate resulting by implication to one to whom an express estate is given, and on the cases of *Adams* v. *Savage*, and *Rawley* v. *Holland*, has appended to it a note by Mr. Butler, in which he disapproves on strong grounds of the doctrine in those cases adopted by Mr. Fearne. But Mr. Butler himself adheres

elsewhere to Mr. Fearne's view, and to the doctrine stated in those cases. Mr. Preston, in his book on Merger (p. 212), says, "The law will not imply an estate when the effect of such implication would be to annihilate an estate expressly limited by the same instrument." And in another part of the same valuable work (p. 514), after stating the law as laid down in the cases of *Adams* v. *Savage*, and *Rawley* v. *Holland*, Mr. Preston says, "still less can an estate result where there is a limitation to some other person for the life of the settlor, as is evident from the cases of *Tippin* v. *Cosin* (*a*), and *Else* v. *Osborn* (*b*);" and he states a case from Dyer, 111, 6 note, "that the fee shall not result to the feoffor if the resulting use would cause the immediate merger of an estate limited to him expressly for years." To the same effect is the law stated by Mr. Sugden, now Lord St. Leonard's, in his learned notes on Chief Baron Gilbert's "Treatise on Uses." Lord Bacon, in his reading on the Statute of Uses, says "If I once limit the whole fee simple of the use out of the land, and part thereof to a person uncertain, it shall never return to the feoffor by way of fraction of the use; but look how it should have gone unto the feoffor; if I begin with a contingent use, so it shall go the remainder; if I entail a contingent use, both estates are alike subject to the contingent use when it falleth, as when I make a feoffment in fee to the use of my wife for life, the remainder to my first-begotten son (I having no son at that time), the remainder to my brother and his heirs; if my wife die before I have any son, the use shall not be in me, but in my brother (*c*)."

These propositions, supported by these great authorities, and by others to which I need not refer, seem not reconcileable with the existence of any resulting trust of the freehold in George Henry Arnold, on the construction of this will and codicil, which could make the rule in *Shelley's case* applicable, so as to attract the subsequent gift to the heirs,

(*a*) 4 Mod. 380. (*b*) 1 P. Wms. 387. (*c*) Bacon's Law Tracts, 351.

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of his body, and give him an estate tail. It must, however, be admitted, that the learning as to estates resulting by implication of law to one to whom any express estate is given abounds in difficulties, as applied to cases where the whole fee simple is not exhausted—difficulties which the profound investigation of great lawyers have not been able satisfactorily to resolve.

The subject, in its reference to the rule in *Shelley's case*, has been discussed by a text-writer of the present day—I mean Mr. Hayes—with acuteness and research of a surpassing degree. His elucidation of the subject goes to shew, that in *Penhay* v. *Hurrell* (*a*), and *Wills* v. *Palmer* (*b*), cases generally referred to as instances of a freehold resulting by implication—it was unnecessary to resort to the doctrine at all.

The present case is not embarrassed with these difficulties. Indeed, on a close and accurate view of this case, the difficulty is to find any sound reason for the notion of any equitable freehold resulting by implication to George Henry Arnold, to whom the estates are devised for ninety-nine years if he should so long live. No part of the equitable freehold can result by operation of law, except so far as the limitations fail to exhaust the whole beneficial interest. The testator in this case has disposed of the whole fee-simple, legal and equitable, by a series of valid limitations, which exhaust the whole, and leave no part of the freehold or beneficial interest undisposed of for any period.

If it could be supposed that the term of ninety-nine years might by possibility expire during the life of George Henry Arnold, so that the contingent limitation to the heirs of his body could not take effect on the determination of that term, how is it possible to hold that the estate of fee simple in the trustees during his life upon a definite trust subsisting for the whole period of George Henry's life, should not have its full operation? And if that estate in the trustees and the trust declared of it have a full opera-

(*a*) 2 Vern. 370, ed Raithby. (*b*) 2 Bla. 687.

tion, what freehold interest could result to George Henry? It was admitted by the defendant's counsel that the beneficial interest of George Henry Arnold in the rents and profits was enjoyed by him, and vested in him by virtue of the devise to him for ninety-nine years if he should so long live, and that the rents and profits must be recoverable by him under that title, and not by virtue of the supposed resulting freehold; as they must also admit, that, during the whole of his life, according to their construction of the codicil, an equitable fee simple, determinable with his life, was vested in the trustees, the equitable freehold, being thus vested in the trustees during his life upon definite trusts co-extensive with his life, cannot result to him.

As the whole of the defendant's case depends upon this notion of an equitable freehold resulting by implication to George Henry Arnold, the principle, as well as the authorities, seem to me to afford no ground for that implication, and therefore the case of the defendant must fail.

It was forcibly argued on behalf of the plaintiff, that the effect of the codicil did not alter the construction of the will. It is admitted, that, upon the will, the devise to the heirs of the body could not give the inheritance to George Henry Arnold. The codicil begins by confirming the will, and then gives the fee simple to the trustees for a limited purpose; and when that purpose is satisfied the trustees would be bound to re-convey, according to the limitations in the will and in its very language. This view of the case treats the codicil as having no other effect on the limitations in the will than would have been produced, if, after making the will, the testator had made a mortgage. The defendant's counsel did not succeed in refuting this view, and unless it can be refuted it is fatal to their case. My opinion, therefore, is, that the plaintiff Coape is entitled to a declaration in his favour as equitable tenant in tail of these estates.

Appl. 4 De Jen M & G. 574.

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*May* 10*th*.

## PYECROFT *v.* PYECROFT.

On a motion to dissolve an injunction (there being no answer) the Court will not dissolve the injunction upon the sole ground that the plaintiff's equity is denied by the defendant's affidavit, where the affidavit did not traverse all the facts on which the plaintiff's equity rested.

THIS was a motion by the defendant to dissolve an injunction which had been obtained ex parte, restraining him from further prosecuting an action at law, which he had commenced on a promissory note, dated the 16th of June, 1845, given by the plaintiff. The affidavits in support of the motion, which where an echo of the bill, averred that in June, 1845, one Job Pyecroft (a brother of the plaintiff and defendant) applied to his uncle, William Pyecroft, for a loan of 100*l*., which the latter consented to grant, on the terms that the plaintiff should become surety for the debt, by giving his promissory note for 100*l*. The uncle, on receiving the plaintiff's note, advanced the money by a cheque on his bankers. The plaintiff had previously lent 100*l*. to Job, who had given him as security a promissory note for the amount of the loan. In September, 1852, Job wrote to his uncle, stating that he was apprehensive of being sued by the plaintiff on his note, which the plaintiff held; in consequence of which the uncle addressed a letter to the plaintiff, requesting to have delivered to him the note on which Job was liable to the plaintiff. The plaintiff accordingly sent to his uncle the note given to him by Job.

In January, 1854, the uncle died, having appointed the defendant William Pyecroft (a third brother) his executor. On the day of the funeral the executor intimated his intention of delivering up to Job the note given by him to the plaintiff as a counter security for the amount advanced by the uncle, and which had been handed to the uncle, and, in spite of the plaintiff's remonstrance, he carried into effect his intention by delivering the note to Job, who immediately destroyed it. The defendant then threatened to proceed at law against the plaintiff on the note he had given to the uncle to secure Job's debt, and shortly afterwards

commenced an action. The plaintiff thereupon filed this bill.

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The affidavits adduced in evidence by the defendant positively and directly denied that the note in question was given by the plaintiff as surety for Job.

*Statement.*

Mr. *Bacon* and Mr. *Ellis*, for the plaintiff, contended that there was no defence at law, and that consequently the plaintiff was entitled to come into this Court for relief. —They cited *Watson* v. *Alcock* (*a*).

*Argument.*

Mr. *Malins* and Mr. *Selwyn*, for the motion, contended, first, that, the plaintiff's case being flatly contradicted by the affidavits, which served the purpose of an answer, the Court could not interfere between the parties. Under the old practice on a bill and answer, where, on an interlocutory proceeding, the answer denied the facts which proved the plaintiff's equity, the Court refused to interfere. That was really the case here, except that the denial was by affidavit instead of by answer—a distinction which it was submitted was immaterial. Secondly, it was contended, that the defence set up, viz. that the principal debtor was discharged, was a valid defence at law, and that this consequently would not withdraw the case from the adjudication of the proper tribunal.

The VICE-CHANCELLOR:—

*Judgment.*

The case must now be considered as being in the same situation as if the plaintiff was shewing cause against dissolving the injunction upon the merits disclosed in the answer. Under the old practice, where the answer denied the facts which constituted the plaintiff's equitable rights by the rule of the Court the injunction could not be sus-

(*a*) 1 S. & G. 319.

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*Judgment.*

tained, even though an indictment for perjury was pending against the defendant in respect of the allegations in his answer. Here there is no answer to the various allegations in the bill, and the question now arises, whether the same rule is applicable to cases in which affidavits are substituted for the answer? In my opinion, the flat denial of the plaintiff's rights made in an affidavit, in which the whole facts on which the plaintiff's equity depends are not traversed, but the deponent with a general denial swears just as much or as little as he pleases, is no ground for dissolving the injunction. Unless the whole of the facts on which the equity depends are traversed, the injunction ought not to be dissolved. I shall, therefore, refuse this motion.

*June 12th.*

## BELLAMY *v.* HILL.

A testator, having given certain annuities, gave his real and personal estate to trustees, on trust to pay them; and, from and after the decease of the last survivor but one of the said several annuitants, his children and grandchildren, upon trust to sell the same, and to render the residue of his estate into money, and to divide the same among the said survivor whose annuity shall then cease, and all and every his grandchildren who should be living, if any should be born after the date of his will, and the children of such of his grandchildren, either the said annuitants or born after the date of his will, as tenants in common, except only that the child of any grandchild who should survive its parent should take its parent's share. The children being all dead, and two annuitants living:—*Held*, a great grandson of the testator took a vested interest.

JOHN BELLAMY, the testator in the cause, by his will, dated the 31st of March, 1796, gave to his wife Hannah an annuity of 20*l.* for her life, and to his son Joseph 100*l.*, and 20*l.* a year for his life, to commence from the testator's death. And from and after the decease of his son Joseph the testator give to his children, if more than one should be living at his decease, 500*l.* equally to be divided, and if but one, to such child. The testator gave to his son-in-law, Charles Thomas, 40*l.*; and to his son-in-law, Thomas Reynolds, 40*l.*; to Margery Thomas, 20*l.* a year for her life, to her separate use; and after her decease he gave to such of her children as should be living at her decease 400*l.*

And he gave to his daughter Mary, the wife of Thomas Reynolds, 20*l.* a year to her separate use; and from and after her decease, to such of her children as should be living at her decease he gave 400*l.* He also gave to his granddaughter Catherine, the daughter of the said Margery Thomas, the yearly sum of 20*l.*, and to her sisters Susannah, Margery, and Johanna, daughters of the said Margery Thomas, and Susannah, the daughter of the said Mary Reynolds, an annuity of 10*l.* each to their separate use. And the testator also gave to his grandson John Bellamy Reynolds an annuity of 15*l.* for his life; and to his brother Joseph Reynolds 10*l.* a year for life. And to his four friends, William Hill, Charles Ruby, Thomas Philpotts, and John Gardner, the testator devised all his real estate and trust estate, copyhold and leasehold estates, goods, chattels, bonds, monies, and personal estate, to hold the real estates to their own proper use, and to them, their heirs, and assigns, and the personal estate to them, their executors, administrators, and assigns, with liberty to sell the same for the benefit of his general estate, and for the better carrying into effect the trusts of the said will; and also in like manner to call in and place out his monies on mortgage, &c., and to pay his just debts, and to make necessary repairs, &c.

The testator then used the following language, "and upon further trust to pay all the said several annuities and legacies hereinbefore mentioned, according to the true intent and meaning of this my will, and from and after the decease of the last survivor but one of the said several annuitants, my children and grandchildren, upon further trust for sale as aforesaid, and with the like power as aforesaid to render all the residue and remainder of my real and personal estates into money, and to pay, distribute, and divide the same equally, share and share alike, with and among the said survivor, whose annuity shall then cease, and all and every my grandchildren as shall be living, if any should be born after the date of this my will, and the children of such living grand-

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*Statement.*

children either the said annuitants or born after the date of this my will, as tenants in common, except only that the child or children of any grandchild shall be entitled to the share or part the parent would be entitled to receive, if more than one in like manner as tenants in common."

The testator appointed Charles Ruby and Thomas Philpotts his executors, and died on the 29th of April, 1798. In Trinity Term, 1809, the bill was filed in the Court of Exchequer, to administer his estate, and on the hearing of the cause on the 19th of June in that year, the usual inquiries were directed to the deputy remembrancer. By a decree made on the 4th of July, 1812, on further directions, the residue was directed to be invested, and sufficient sums severally set apart to answer the different annuities given by the will. Various orders were made from time to time in the suit. In 1818, Hannah, the testator's widow, died; on the 21st of May, 1823, Joseph Bellamy, the testator's son, died; and by an order of the Court of Exchequer, dated the 9th of February, 1825, 500*l.* was paid to his children. The last survivor of the testator's children died on the 3rd of May, 1839.

It appeared by the Master's report, dated in 1840, that all the testator's children were dead, and that there were eleven grandchildren in all, of whom one Susannah Hayling was dead, leaving six children.

By an arrangement, made in 1840, by the annuitants then living, the right of survivorship, as between themselves, was abandoned, and one-eleventh part of the fund paid to them.

At the date of the petition there were two annuitants living. Of the testator's grandchildren eight were dead, six of whom died without, and two leaving, issue. The petitioner, William Bellamy Steed, who was the great-grandson of the testator, now claimed to be entitled to a vested interest in his deceased mother's share, and presented this petition, praying that such portion of the fund as was now emancipated, viz. one-eighth, might be distributed under the order of the Court. The surviving annuitants were co-petitioners.

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Argument.

Mr. *Elmsly* and Mr. *F. T. White* contended, that the petitioner, who was the great-grandson of the testator, took a vested interest under the will. There was a gift to the great grandchildren by description, though the interest of the grandchildren did not vest till the death of the last survivor but one of the annuitants.

Mr. *Lambert*, for the assignee of one of the grandchildren, said, it was clear the fund was not divisible until the death of the last survivor but one of the annuitants: *Beck* v. *Burn*(*a*), *Eyre* v. *Marsden*(*b*). He was interested in deferring the division as long as possible.

Judgment.

The VICE-CHANCELLOR said, he thought that the great-grandchildren of the testator took vested interests under the will; and he should therefore make the order as prayed.

(*a*) 7 Beav. 492. (*b*) 2 Keen, 564.

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## KANE *v.* MAULE.

## KANE *v.* REYNOLDS.

*June 13th.*

An intestate was supposed to have no next of kin, and the Solicitor of the Treasury obtained letters of administration on behalf of the Crown, and recovered the estate, but afterwards a person, proved to be next of kin, procured letters of administration, and a revocation of the administration which had been granted on behalf of the Crown, and then instituted a suit to recover the estate, which was ordered to be paid over to the plaintiff:—*Held*, that the Crown was not entitled to the costs of this suit.

THIS claim was filed by Mary Kane against Henry Revell Reynolds and James Kane, for the administration of the estate of Thomas Kane.

In March, 1846, Thomas Kane died intestate, having been possessed of considerable real and personal estates. At his death, it was supposed that he had left no representative, and accordingly, on the 26th of February, 1847, letters of administration were granted to George Maule, the Solicitor to the Treasury, on behalf of the Crown.

On the 8th of April, 1851, the defendant James Kane filed a claim in this Court, alleging himself to be next of kin of the

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*Statement.*

intestate. The claim came on to be heard on the 28th of May, 1851, when it was referred to the Master, inter alia, to inquire and state who were next of kin of the intestate, according to the statute of distributions, living at the time of his decease, and whether any of them were dead, and if so, who were their representatives; and if the Master should find that the next of kin had been served, that he should take an account.

In November, 1851, George Maule died, and shortly afterwards the defendant Reynolds was appointed Solicitor to the Treasury, and as such succeeded to all the rights, liabilities, &c., which were vested in the said George Maule.

On the 23rd of December, 1852, the Master made his report, by which he found that the plaintiff (with her sisters and the representatives of such of them as were dead), were the next of kin of the deceased. On the 24th of October, 1852, the report was confirmed. On the 15th of March, 1853, the defendant James Kane presented a petition to discharge the Master's report, which, on the 25th of April, 1853, was ordered to stand over until the hearing of the cause on further consideration. In September, 1852, the plaintiff commenced proceedings in the Ecclesiastical Court against the defendant Reynolds, in order to obtain a revocation of the letters of administration. On the 22nd of June, 1853, the letters of administration were revoked; and administration of the estate of the intestate was granted to the plaintiff, as his lawful cousin-german, and one of his next of kin.

The defendant, James Kane, declined to take any further steps in the claim filed by him, in which, consequently, the proceedings remained defective.

*Argument.*

The plaintiff's claim now came on for further consideration.

Mr. *Bacon* and Mr. *Selwyn* for the plaintiff.—The plaintiff's right to have the personal estate given over to him is not disputed, and the only question is as to the costs. The principle on which costs are given is, that, where the Crown

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*Argument.*

is sued in its public capacity, it neither gave nor received costs. Where, however, the Crown sued for a beneficial interest as here, the costs must abide the event as in ordinary cases: *Smith* v. *Earl of Stair* (*a*). In this case the advisers of the Crown had put the plaintiff to enormous expenses, by compelling the plaintiff to prove facts well known to them. Under these circumstances, the plaintiff was entitled to the costs.

Mr. *Sheffield*, for James Kane, asked for the costs of the first claim.

Mr. *Wickens*, for the Crown, contended, that, on the ordinary principle, the Crown was entitled to have the costs of the administration suit paid out of the estate. But, even if the Crown were to be regarded as a trustee for the plaintiff, it was a matter of course, that, as trustee, the Crown had a lien on the fund in its possession to the extent of all costs, charges, and expenses.

The VICE-CHANCELLOR:—

*Judgment.*

James Kane has very properly taken no further steps in his claim, and I shall, therefore, dismiss his petition, without costs, which will terminate the proceedings in that suit.

The other suit is *Kane* v. *Reynolds*, which is by Mary Kane, whose title is here established as next of kin of the intestate, and who, as his administratrix, is entitled to property which for a long course of years was supposed to belong to the Crown. The effect of the decree was to compel Reynolds, whose administration was revoked before this claim was filed, to account for and hand over to the plaintiff the money received by him as administrator. This suit, therefore, is not an administration suit at all, but a suit against the Crown by the rightful owner to

(*a*) 2 H. of L. Cas. 807.

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*Judgment.*

recover property which at one time was conceived to belong to the Crown. Not being an administration suit, it can only be regarded as a suit asserting an adverse title against the Crown, and calling on the Crown to deliver to the plaintiff the balance of the intestate's personal estate now in the hands of Reynolds; and the decree must be to that effect.

I am asked, however, to recognise a right in Reynolds to deduct the amount of his costs, by way of lien, from the fund in his possession, and to order him to hand over only the balance. As this is not an administration suit, I cannot allow him to deduct his costs as administrator, for his letters of administration were revoked, and the administration granted to the plaintiff before this suit was instituted. But it has been said—and I felt at one time disposed to adopt that view—that Reynolds was placed in a fiduciary character with respect to this property; and that, assuming that fact, this Court would not take from him what was in his possession in that character without recognising his right to his costs. But the answer is, that this is not a suit against him in his fiduciary character, which he had lost, but is a suit for an adverse claim which has been established against him. I cannot, therefore, recognise any right in him, on the principle of lien, to his costs. He holds by a wrongful title, and must be compelled to pay the amount over to the party entitled. In the case of *The Attorney-General* v. *Ashburnham* (*a*), Sir *John Leach* distinctly stated, that the rule that the Crown can neither pay nor receive costs was not the general practice in Courts of Equity. In this particular case I do not think I ought to make any order as to the costs of the suit. The costs of the administration, under which until revoked the estate was realised, the Crown will, of course, be entitled to.

(*a*) 1 S. & S. 397.

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## POWDRELL *v.* JONES.

*March 29th.*

By a settlement made on his marriage, the settlor covenanted with trustees to settle estate A. upon his wife, but did not. He subsequently exchanged estate A. for estate B. and 1050*l.*, and died insolvent. In a suit by a creditor to administer his estate, the Court declared that estate B. and the 1050*l.* ought to be taken in substitution for A.:—*Held*, that the 1050*l.* was a debt by specialty under the covenant.

THE testator, George Harper, by his marriage settlement, dated the 3rd of August, 1843, covenanted for himself, his heirs, and all necessary parties, within twenty-four months, to convey to the trustees, upon the trusts in the said indenture declared, a messuage and lands called Belvedere, of which he was seised in fee subject to a mortgage. The trusts contained in the deed were for the benefit of the husband and wife in that settlement, with certain provisions for raising a sum of 3000*l.* on the settled property, with a view to pay off the annuity mortgage.

The marriage was solemnised shortly after the execution of the settlement, but Harper never settled Belvedere; but, by a memorandum of agreement, dated the 25th of June, 1852, he exchanged the Belvedere property, and a lease of a messuage called St. Mary's, with a Mr. Goodall, for a property called Mossfields and a sum of 1050*l.* The messuage called St. Mary's was of the value of 82*l.*, the balance, 968*l.*, together with Mossfields, making up the value of the Belvedere property.

On the 15th of December, 1851, the first trustee of the settlement being desirous of retiring from the trust, the defendant Oswell was appointed trustee in his room.

On Harper's death, the bill was filed to administer his estate. On the 30th of May, 1853, the cause came on to the hearing, when his Honour declared the marriage settlement valid; and declared that the mansion house, with the lands and grounds thereto belonging, called Mossfields, situate at Dollington in the county of Salop, and the sum of 1050*l.* received by the said George Harper in exchange for the said estate called Belvedere, in the said indenture of settlement mentioned, ought to be taken in substitution

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for the said Belvedere estate; and that all the estate and interest of which the testator died seised in the said Mossfield estate be subject to the trusts of the said settlement.

And it was declared, that the defendant Edward Oswell, as trustee of the settlement, is entitled to come in and prove as a creditor of the said George Harper, deceased, for such sums or any as should or might be due or owing to him in respect of the said sum of 1050*l.*, and interest thereon from the death of the said George Harper at the rate of 4*l.* per cent.; and that what should be recovered under such proof would be subject to the trusts of the said settlement.

The decree also directed the following inquiry:—

"An account of what, if anything, was due to the defendant Edward Oswell, as trustee of the marriage settlement of the said testator in respect of the said sum of 1050*l.*, and to all other the creditors by simple contract of the said testator."

In taking the account in Chambers, the Chief Clerk certified that he, Oswell, was a simple contract creditor for the sum of 968*l.* under the articles of settlement.

This was a motion on behalf of the trustee to vary that certificate.

*Argument.*

Mr. *Bacon* and Mr. *H. Humphreys* appeared for the plaintiff.

Mr. *Malins* and Mr. *Kenyon* in support of the motion.—By the covenant Harper bound himself to settle a particular estate within a given period; but, having failed to fulfil his engagement, the decree of the Court declared that Mossfields and the sum of 1050*l.* should be taken in substitution. The correct view of the decree is not, that it created a new obligation, but that it brought within the operation of the existing covenant one part of the testator's estate in lieu of another. The effect is the same if Mossfields and

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1050*l.* were specified in the covenant in lieu of Belvedere. Here the covenant was for a specific thing and created a lien on the property which was the subject of it: *Fremoult* v. *Dedire* (*a*).

*Argument.*

The cases of *Musson* v. *May* (*b*), and *Lomas* v. *Wright* (*c*), were also cited.

Mr. *Wigram* and Mr. *Charles Hall* contra.—There never was any covenant to settle Mossfields or the sum of 1050*l.* The only covenant on the part of the testator was to settle Belvedere, which covenant he had violated, and during his life his estate would have been liable to compensate for the breach of covenant by damages to be recovered in an action at law. This was no more than a claim for the difference between the value of the two estates, which was clearly a debt by simple contract. In this case, moreover, the decree had determined the quality of the debt by treating it as a debt by simple contract.

The VICE-CHANCELLOR:—

*Judgment.*

The only difficulty arises from the terms of the decree. The question is, whether the sum of 1050*l.*, which is claimed against the estate of George Harper deceased, is a debt by specialty or simple contract. It certainly was either a debt under the covenant, or by simple contract against Harper's estate. It is said that the decree has stamped this debt with the character of a simple contract debt merely. I do not feel bound to take that view of the decree; for it specifically directs an account as to the 1050*l.*, and the words "other creditors by simple contract" cannot alter the character of the 1050*l.* if it be in fact a specialty debt. The decree of the Court has established, that, under the covenant to settle Belvedere, what has been done by Harper has made the covenant to settle Belvedere attach to

(*a*) 1 P. Wms. 428. (*b*) 3 V. & B. 194. (*c*) 2 My. & K. 769.

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*Judgment.*

what was substituted for it, that is, Mossfields and the sum of 1050*l.* But it is said, that the effect of the decree, by bringing by way of substitute the sum of 1050*l.* within the operation of the covenant, makes it a specialty debt. On the other hand it is argued, that the only effect of the decree is merely to create a right by way of lien, and not otherwise, on Mossfields and the 1050*l.* It is contended, that that sum having been received and spent by Harper, created an obligation only by way of simple contract against his estate.

If it is admitted, that the effect of that part of the decree was to give a lien on Mossfields, such right could only arise by virtue of the covenant, which is a contract by specialty. If that be the effect of the decree as to the lien on Mossfields, what is the effect of it as to the 1050*l.*? How can it be said, that the right accruing under the decree by substitution of Mossfields, is not to be pursued in the same way; because, if the 1050*l.* by the operation of the decree is brought under the operation of the covenant, it is brought under the operation of what is an obligation by specialty.

If Harper were alive, and this decree had been pronounced, declaring that Mossfields and the sum of 1050*l.* were to be substituted for Belvedere, and he had after such a decree refused to convey Mossfields, and to pay the sum of 1050*l.*, he would have been compelled to do so by the operation of the decree, founded upon the covenant. The only contract by Harper as to this settlement is the covenant, i.e. a contract by specialty; and, therefore, the right under that obligation by specialty being established by the decree, I see no ground for holding, that, if there be a contract at all binding Harper's estate, it can be any other than that by his covenant under seal, and therefore a specialty debt.

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## BEANLAND *v.* BRADLEY.

*July* 1*st.*

Where a person, by a deed, eight days before his death, grants a benefit to his grandson and son-in-law, there is no such confidential relation as to induce this Court to presume fraud.

JAMES BEANLAND, by his will, gave part of his real and personal estate to his daughter Ann Bradley, his nephew George Beanland, and his friend Lester Hargreaves, upon certain trusts, for the benefit of James Beanland, the son of Ann Bradley.

The testator died on the 25th of August, 1852, and appointed Ann Bradley, George Beanland, and Lester Hargreaves, executrix and executors of his will. The bill, which was filed by the plaintiffs, who had purchased the share of Eliza Hall, one of the legatees under the will, contained inter alia the following allegations:—"That, at the date of the agreement of the 12th of August, 1852, the testator was upwards of eighty-five years of age, and was deaf, and he had become and was much weakened and infirm, both in mind and body, and he was and had for some time been confined to and was unable to leave his bed, and he was not in a condition to exercise any valid disposition of his property. He had for a considerable time employed Messrs. Bentley & Wood, of Bradford, as his solicitors, and at the time he executed the agreement was not in the habit of executing any instrument of importance without first consulting them.

"The defendant Ann Bradley had long lived with the testator at Shipley, and was acting as his housekeeper at the date of the agreement; and from the infirm state of his body and mind she had a great influence over him. The defendant John Bradley, at the date of the said agreement, lived with the testator.

"Under the testator's estate of Firth Carr, containing three acres, was valuable fire clay and brick; and shortly before his death John Bradley and James Hall formed a design of obtaining from the testator, at a rent very much

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below the real value, a lease of the same; and the defendant Ann Bradley agreed to assist them in carrying out their design; and accordingly one of them prepared an agreement only thirteen days before the testator's death, and they came to the said testator, who was then in his bed, and they alleged, that he the said testator subscribed the said agreement, and his signature appears to be subscribed to the said agreement; but, in fact, the said testator was not then able to sign and did not sign the same. The agreement purported to be sealed by the parties thereto, but is not sealed."

The lease was—"An agreement made the 12th day of August, 1852, between James Beanland, of Shipley, in the parish of Bradford, in the county of York, gentleman, of the one part, and John Bradley and James Hall, of Shipley, parish of Bradford and county of York, of the other part. The said James Beanland, for the consideration hereinafter mentioned, doth hereby let unto the said John Bradley and James Hall all the fire clay and common brick clay situated and being in the township of Heaton and parish of Bradford in the county of York, in the land known by the name of Firth Carr, at the yearly rent of 20*l.* The aforesaid John Bradley and James Hall to have all the clay they can get in the aforesaid land at the above yearly rent; and the said John Bradley and James Hall to have the privilege of getting and making the same into brick, &c., to the best advantage, with paying reasonable damage for the same; the time for getting the clay to be eleven years. The lease to be renewed, if required, by the said John Bradley and James Hall, and to pay during the said term unto the said James Beanland, his heirs or assigns, &c. &c., and the said rent or sum to be paid by equal quarterly payments at the several times hereinafter mentioned; the first of such payments to be made on the first day of September, the first day of December, the first day of March, and on the first day of June in each year. And

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it is further agreed that the said John Bradley and James Hall, at their pleasure, at all times during the said term of years herebefore granted, into and upon the said land or parcel of land, or any part thereof, to enter, and therein to make, dig, sink, drive, and erect, and to have, use, and enjoy all such roads, soughs, and other works as shall be necessary for the purpose of getting, working, laying up, carrying away, and manufacturing clay into bricks, tiles, &c. &c., or to sell the said clay in its raw state. In witness whereof the said parties to these presents have hereunto set their hands and seals, the day and year first herein written."

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John Bradley was the husband of the testator's daughter, Ann Bradley, and James Hall was the son of Eliza Hall, another of the testator's daughters.

It was proved by the evidence that the testator at the date of the agreement was in a state of bodily weakness, but there was no evidence to shew that his mind was affected.

It was proved that the rent reserved was much below the real value of the estate. There was no evidence to shew any undue influence by Ann Bradley or the parties to the lease.

It was proved, on the part of the defendants, that the testator had on previous occasions granted leases without the intervention of a solicitor.

*Argument.*

Mr. *Elmsly* and Mr. *G. L. Russell* for the plaintiff.—The principle upon which this Court sets aside a benefit unfairly obtained, is not confined to cases between trustee and cestui que trust, or between guardian and ward. On the contrary, it is extended to every case where confidence is reposed in a person, who, from his position or the circumstances in which he stands, is possessed of influence over another, and abuses it for his own advantage: *Cooke* v.

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*Argument.*

*Lamotte*(*a*), *Hoghton* v. *Hoghton*(*b*), *Billage* v. *Southee*(*c*), *Ahearne* v. *Hogan* (*d*).

In this case it is proved, that Ann Bradley was possessed of great influence over the testator; that he was much dependent upon her in consequence of the infirm state of his health; that, just eight days before his death, without the intervention of a solicitor, he signed the agreement which had been previously prepared by the defendants, and by which the most valuable part of his property, viz. the clay for fire clay and brick, was transferred to John Bradley and James Hall for a totally inadequate rent. It was contended, that these circumstances were sufficient to induce a Court of Equity to presume fraud and to annul the transaction.

Mr. *Bacon* and Mr. *Pearson* appeared for John Bradley and Ann Bradley, and Mr. *Ellis* for James Hall, but were not called on by his Honour.

Mr. *Pemberton* appeared for the testator's heir-at-law.

The VICE-CHANCELLOR:—

The bill seeks to set aside a lease of the Firth Carr estate.

The bill alleges, that, when the lease was executed by the testator, he was confined to his bed; that Ann Bradley had acquired much influence over him, and that he was induced by her to execute this lease just eight days before his decease, and without professional advice, in favour of his grandson and his son-in-law, the husband of Ann Bradley. If the allegations of undue influence and surprise had been proved, there would be no difficulty in granting the relief

(*a*) 15 Beav. 234.
(*b*) Ibid. 278.
(*c*) 9 Hare, 534.
(*d*) Dru. 326.

sought by this bill; but the plaintiff fails in proof of what is the foundation of his case—the undue influence and surprise.

It is said, that the lessor, being the grandfather of one of the lessees and father-in-law of the other, there existed such a confidential relation between him and those he intended to benefit, as to throw upon them the onus of proving the absence of undue influence. It is a new doctrine, that a parent cannot by a deed, only a few days before his death, benefit a child or grandchild. The case which has been cited in support of it, *Hoghton* v. *Hoghton* (*a*), is very different. That was a case in which a son, having just attained twenty-one, gave up property for the benefit of his father, who was his natural guardian, and was therefore within that rule of this Court which protects a person under the influence of others from having that influence abused. There is, however, no rule of this Court which prohibits a man by a voluntary deed from bestowing a benefit upon his son or his grandson or son-in-law, even although only a few days before his death. To provide for his children or grand-children is, or may be, a necessary duty; and, where a father discharges that duty, this Court will not presume a fraud. If, therefore, fraud is alleged, it must be proved in the ordinary way. In this case no fraud has been shewn, and I must, therefore, dismiss the bill, so far as it seeks to have the lease set aside.

(*a*) 15 Beav. 278.

*July 5th.*

## NEWHOUSE *v.* SMITH.

Devisee in tail of real estate, claiming to be exonerated out of the descended moiety from a mortgage, filed his bill against the heir more than thirty years after testator's death, and more than twenty years after the heir's title accrued, but within two years after the deficiency of the personal estate had been ascertained under a decree of the Court:—*Held*, that the devisee was entitled to a decree for exoneration against the heir, with costs.

THIS bill was filed by Charlotte Susan Newhouse, for the purpose of obtaining a declaration from the Court, that she is entitled to have a moiety of certain real estate, devised to her by the will of Nicholas Turner, exonerated from the several sums of 1500*l.*, 500*l.*, and 1500*l.*, with interest due thereon, out of the other moiety of his real estate which descended to her coheirs.

The Rev. Nicholas Turner, the testator in the cause, being seised of an undivided moiety in certain freehold land, with thirteen messuages and other buildings thereon, situate in the parish of St. Martin in the Fields, by deeds, dated the 28th and 29th of June, 1811, mortgaged the same in fee (with a proviso for redemption) to John Neale, to receive 1500*l.*, with interest at 5*l.* per cent.

The amount was further secured by a bond of the same date for the like amount. By an indenture of the 29th of May, 1813, the same premises were charged with a further sum of 500*l.* advanced by John Neale to the testator. By indentures of lease and release, dated the 17th and 18th of August, 1819, the same premises were mortgaged by the testator to George Barrett and Thomas Mellersh, to secure a sum of 1500*l.*, with interest at 5*l.* per cent.

The testator, Nicholas Turner, by his will, dated the 25th of March, 1816, directed all his just debts, funeral and testamentary expenses to be paid by his executors thereinafter named, as soon as conveniently could be after his decease; and with the same, and the payment thereof, he thereby charged all his real and personal estate; and he gave and bequeathed all his goods, chattels, rights, credits, money, securities for money, personal estate and effects, which he might be possessed of or interested in at the time of his decease to his wife Sarah Turner and Nicholas Tur-

ner, a captain in the Royal Artillery Drivers, (in the said testator's will called his son, and hereinafter called Nicholas Turner the son), equally to be divided between them, share and share alike; and the said testator thereby gave and devised all his messuages, lands, hereditaments, and real estate whatsoever, including his moieties or other parts or shares in the said thirteen houses in Coventry-street, Oxenden-street, and Great Whitcomb-street aforesaid, unto and to the use of the Rev. Francis Whitcomb, clerk, and the Rev. Joseph Francis Fearon, clerk, and their heirs, upon trust, from time to time, to receive the rents and profits of the said hereditaments, and to pay and apply the same as follows:—Videlicet, to pay to his the said testator's wife, the said Sarah Turner, two full and equal third parts of the said rents and profits during the term of her natural life, and to pay the remaining third part of the said rents and profits unto the said Nicholas Turner the son, during the life of his the said testator's wife; and after his decease upon trust for and to convey the same and every part thereof unto the said Nicholas Turner the son, and his heirs, for ever; but, in case the said Nicholas Turner the son should die in the lifetime of the said testator's wife, then upon trust to pay to Mary, the wife of the said Nicholas Turner the son, one full equal third part of the said rents and profits, for the term of his natural life; and after the death of his the said testator's wife Sarah, if the said Nicholas Turner the son should be then deceased, but not otherwise, then as to the whole of his the said testator's said messuages, hereditaments, or other real estates before therein given, subject, nevertheless, and without prejudice, to the payment to the said Mary Turner of the said one-third part of the rents, issues, and profits thereof, upon trust for the heirs of the body of the said Nicholas Turner the son, for ever; and, in default of such issue, upon trust for the benefit of the plaintiff Charlotte Susan Newhouse and Elizabeth Odell (now deceased), equally to be divided between or amongst them,

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share and share alike, as tenants in common, and not as joint tenants, and for the heirs of their respective bodies lawfully issuing; but, in case either of them the said Charlotte Susan Newhouse and Elizabeth Odell should depart this life under the age of twenty-one years, without leaving lawful issue, then in trust for the survivor of them, and the heirs of her body lawfully issuing.

The testator, by a codicil, dated the 29th of July, 1817, revoked the devise to Francis Whitcomb and Joseph Francis Fearon, and devised the said estates to the use of Francis Whitcomb and William Milton Bridger on the trusts in the will, and also appointed them executors.

The testator died on the 19th of December, 1819, leaving no lawful issue. Catherine Ann Dorset, the daughter, and William Toners Smith, the eldest son of Charlotte Smith, the testator's deceased sister, were his co-heirs at law.

Nicholas Turner, the son, died without issue in February, 1826; and his widow died on the 12th of November, 1835. Elizabeth Odell died in 1827, having attained the age of twenty-one, but without having done any act to bar the estate tail created by the testator's will; and on her death one moiety of the testator's real estate, subject to the mortgage debts, and subject to the subsisting life estate and interests in Sarah Turner and Mary Turner, descended to the co-heirs of the testator. Sarah Turner died on the 26th of January, 1827, and, by a deed, dated the 4th of February, 1837, the plaintiff, the devisee under the testator's will, barred the estate tail, as to her moiety created by the testator's will.

In April, 1849, the Rev. T. G. Calhoun filed a bill on behalf of himself and all other the creditors of the testator, in which Master *Horne*, by his report, dated the 26th of July, 1851, found, inter alia, that, except the debt of the plaintiff in that suit for 280*l.* and the mortgages, there were no debts of the testator; and that the whole of the testator's estate undisposed of amounted to 2693*l.* 5*s.* 8*d.*;

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which, after deducting costs, was decreed to be carried to the account of the personal representatives of Nicholas Turner, deceased.

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On the 26th of March, 1852, the suit of *Smith* v. *Bridger* was instituted by an incumbrancer against W. M. Bridger, the executor of the testator, in which it appeared that the personal estate was insufficient to pay the simple contract and specialty debts. The suit came to a hearing on the 29th of July, 1854.

On the 19th of August, 1853, the mortgagees filed their bill to foreclose the mortgage. Upon which the devisee, the personalty being insufficient to pay off the mortgage, interest, and costs, filed this bill, as devisee of the moiety of the real estate, claiming to have the devised moiety exonerated out of the descended assets. She had for four years paid the interest on the mortgages. The defendant, in her answer, claimed the benefit of the Statute of Limitations.

*Argument.*

Mr. *Elmsly* and Mr. *Welford* for the plaintiff.—There can be no doubt of the principle that descended assets are liable to discharge the mortgages on the devised estates: *Barnewell* v. *Lord Cawdor* (*a*), *Galton* v. *Hancock* (*b*).

Then, with regard to the lapse of time. This was a suit to administer the personal estate, which was only ascertained in 1851 in the suit of *Smith* v. *Bridger*. There was, therefore, no objection from the length of time that had elapsed.

Mr. *Malins* and *Macnaghten* for the co-heirs.—This is in effect an adverse claim against the descended moiety of the testator's real estate, and cannot be sustained after twenty years from the time the right accrued. The testator died in 1819, and on his death the plaintiff ought to have applied to have the devised moiety exonerated from the mortgage. That a reversion expectant on an estate tail

(*a*) 3 Madd. 453. (*b*) 2 Atk. 430.

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*Argument.*

was assets could not now be disputed: *Tyndale* v. *Warre* (*a*). There was no reason, therefore, why the claim was not then made, or at all events in 1827, when the right vested.

In *Fordham* v. *Wallis* (*b*), it was held, that the demand of a simple contract creditor as against the real estate of the testator, which otherwise would be barred by the statute, was not kept alive by a right among the parties to have the assets marshalled. This case fell within the same principle. In *Harrisson* v. *Duignan* (*c*), it was held, that the appointment of a receiver did not avoid the Statute of Limitations, though the incumbrance against the estate was expressly found by the Master in his report.—*Piggott* v. *Jefferson* (*d*) and *Derbishire* v. *Home* (*e*) were also cited.

Mr. *Bacon* and Mr. *Dickinson* for the devisees of the co-heirs.—Suppose the plaintiff were mortgagee in possession, the equity of redemption would be barred by the statute. How then can she be in a better position?

The VICE-CHANCELLOR.—I am disposed to allow the plaintiff's claim as to payments from the filing of the bill; but, if the plaintiff presses for more, I must hear the reply.

Mr. *Elmsly* in reply.—The plaintiff only claims to be allowed the payments for four years from the filing of the bill, and is clearly entitled to that extent. It cannot be said, that her payments were voluntary, because they are necessary to prevent the mortgage being foreclosed.

*Judgment.*

The VICE-CHANCELLOR:—

The arguments of the defendant's counsel have failed to remove the impression which I entertain in favour of the

(*a*) Jac. 212, 218.
(*b*) 10 Hare, 217.
(*c*) 2 Dru. & War. 295.
(*d*) 12 Sim. 26.
(*e*) 3 De G., Mac. & G. 80.

plaintiff's case. The authorities which have been cited do not affect the right to the relief asked by this bill.

It is acknowledged, and, indeed, could not be disputed, that originally the plaintiff had the right to compel exoneration. But the defence relied on is the length of time. At the death of the testator, in 1819, his real estate was subject to several mortgages. There can be no doubt at that time the devisee was entitled to have the personal estate applied in payment of the mortgage, in exoneration of the devised estate; and, in the event of the said personal estate proving insufficient, to have had the descended estates resorted to for the same purposes.

It is contended, however, that the plaintiff was bound to have enforced her right in 1819, at the testator's death, or at least in 1827, when, upon the death of Elizabeth Odell without issue, the defendant took by descent. But the answer to that argument is, that, until the personal estate was administered, it was impossible to say whether it would be necessary for the plaintiff in this suit to have recourse to the real assets at all; and it is certain that it was not until after 1849, that the state of the testator's assets had been definitely ascertained. Under these circumstances, I do not think the Statute of Limitations, which the defendants have insisted on, affords any valid defence. The plaintiff is entitled to the declaration sought by this bill, and to have her costs of suit also raised and paid out of the descended moiety.

I think, however, the plaintiffs are only entitled to an account of the rents from the date of the filing of the bill.

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*June 13th.*

## JAMES *v.* LORD WYNFORD.

A testator, having a vested estate under the will of his grandfather, subject to a life estate in his grandfather's daughter Mary, excepted from the operation of his will the real and personal estate which he might derive from his aunt Mary or any of her family: —*Held*, a sufficient description of his vested interest under his grandfather's will.

ROBERT TAYLOR, by his will, devised certain estates at Crewkerne, to trustees, upon trust for his daughter Mary Ann Taylor for her natural life, and from and after her decease, upon trust to receive and pay the rents and profits for the benefit of all and every the son and sons of her daughter whom she might leave behind her for their maintenance, until he or they should attain the age of twenty-one years; but in case his said daughter should leave no son or sons, then followed a like trust for her daughter; but, in case his said daughter Mary Ann should happen to die leaving no child or children, the testator willed that the trustees should apply the rents and profits for the benefit of his daughter Bridget, for the term of her natural life; and from and after her decease, in trust to pay the same for the benefit of his daughter Bridget's son Robert T. S. Abraham, and all and every son or sons she should happen to have, until he or they should attain the age of twenty-five years; and on his or their attaining that age, in trust for the heirs, executors, and assigns of the said Robert and other sons whom his said daughter should leave, and who should attain the age of twenty-five years &c.; with a gift over.

By the decree of the 1st of December, 1852 (*a*), his Honour declared, that the gift in remainder to Robert was vested; and as he was the only son of Bridget, and lived to attain twenty–five, his estate and interest became indefeasible.

During the life of Mary Ann Taylor, who survived him, Robert T. S. Abraham made his will, dated the 24th of September, 1842, by which, having directed his debts and funeral and testamentary expenses to be paid out of his per-

(*a*) See the case reported 1 S. & G. 40.

*Statement.*

sonal estate, so as not to affect two annuities of 84*l.* and 56*l.* therein mentioned, nor the personalty which he might derive from his aunt the said Mary Ann Taylor; and appointed Thomas King and Francis Falkner joint executors of his will, and appointed his widow Rachel Abraham, during her widowhood only, and the said Thomas King and Francis Falkner guardians of the person and property of his daughter Mary Ann Taylor Abraham; and after giving certain specific pecuniary legacies, which he directed to be paid out of his personal estate, except the said annuities and the personal estate he might derive from his said aunt, he gave, devised, and bequeathed unto the said Thomas King and Francis Falkner, their heirs, executors, &c., the freehold house in which he resided, and his other freehold and leasehold property in Bath, and his estate in the parish of Clevedon, and the said two annuities, and all Long and Consolidated Three per cent. Annuities standing in his name at the date of his will, and his household furniture and effects, money in his banker's hands, and all other his real and personal estate; and directed, that all the before-mentioned real and personal estate should, for the purposes of his will, be considered as personal estate, except the real and personal estate he might derive from his said aunt, the said Mary Ann Taylor, or any of her family, to hold the same to the said trustees, upon trust, to pay the annual income into the hands of his wife Rachel for her separate use for life, and after her decease in trust for her daughter Mary Ann Taylor Abraham.

The testator died on the 28th of November, 1843, leaving Mary Ann Taylor Abraham him surviving, and an infant then en ventre sa mere.

Mary Ann Taylor died in 1843, never having been married.

Rachel Abraham, the widow of the testator, presented this petition, claiming to be entitled to a life estate in the Crewkerne estate.

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Mr. *Elmsly* and Mr. *Karslake* for the petitioner.—At the date of the will the testator had a vested interest in the estates; he could not, therefore, describe such estate as the real estate which he might derive from his aunt Mary. It was clear, therefore, on this ground, that that property was not excepted. Secondly, the words "from any of the family of my aunt" meant, in the ordinary sense, the children or grandchildren of his aunt, and could not by any reasonable intendment refer to her father. If the Court should adopt either of these views, the petitioner would be entitled to a life interest in the property.

Mr. *Malins*, Mr. *Walter*, Mr. *Collins*, Mr. *G. M. Giffard*, Mr. *Bates*, and Mr. *C. M. Roupel*, appeared for other parties.

*Judgment.*

The VICE-CHANCELLOR:—

The question depends on the meaning of the words of exception. It has been argued, that the words "except the real and personal estate which I may derive from my aunt or any of her family," being words de futuro, cannot be construed as extending to an estate of which the testator at the date of his death was seised as a remainder in fee. I cannot take that view, because I think a vested remainder, to which he was entitled under the will of his aunt's brother, might naturally be spoken of as an estate which he might derive from one of the aunt's family.

Then, it has been contended, that the words "any of her family" could only mean her children. I have no authority for putting such a limited meaning on these words. I think the father of the testator's aunt was one of the family in the sense in which the words seem to have been employed. I am of opinion, therefore, that the petitioner is not entitled to the declaration asked by his petition.

1854.

## WICKHAM *v.* GATRILL.

*July 20th.*

The clerk to a banking firm who had misappropriated the money of the firm died before the fraud was discovered, intestate, leaving considerable property, which was placed by the widow in the custody of the bank. She subsequently obtained administration of his estate, and, to recover the property, commenced proceedings against the bank, who filed their bill for an injunction and administration of the estate. Demurrer by the administratrix, on the ground, that, the bill alleging a felony, no civil remedy lay in respect thereof—overruled.

THIS was a general demurrer to the plaintiffs' bill for want of equity.

The bill alleged in substance as follows:—

First—The plaintiffs carried on business as bankers, &c.

Secondly—In 1838, James Rudge Gatrill, deceased, was engaged as managing clerk to the plaintiffs, and continued in their employ as such managing clerk, until the 3rd of May, 1854, when he absented himself, being very ill and unable to leave his bed. He died on the 6th of May, intestate, leaving the defendant Hannah Gatrill his widow, and James Matcham Gatrill, his eldest son and heir-at-law, seised and possessed of real and personal estate of considerable value.

Thirdly—While employed in the banking business, the intestate acted as agent and sole clerk in the firm, and declined to have an assistant, and was in the constant habit of receiving and constantly received on behalf of the plaintiffs considerable sums of money, and was the only person who kept the books. In consequence of the confidence the plaintiffs reposed in him, and from his long service, they did not in his lifetime strictly scrutinise and examine the said books kept by him, as they otherwise would have done; and, down to his death, no true account of the monies received by him, and of his transactions on their behalf as such clerk, was obtained. On the plaintiffs, on the decease of the said intestate, investigating the books, it appeared, as the fact is, that he had appropriated considerable sums of the plaintiffs' money to his own use, and had never accounted for the same, but made from time to time false and fictitious entries in the said books, for the purpose of concealing his fraudulent misappropriation of the monies received by him at the date of

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his death. There was a very large sum, amounting to several thousand pounds, due to the plaintiffs, and the same is now due, and there is due also 300*l.* and upwards on his account, which he had overdrawn.

The fourth allegation was immaterial.

Fifthly—Immediately on the death of the intestate, the defendant Hannah Gatrill sent for the plaintiff Charles Bailey, who is a solicitor, in order to place in his hands the documents &c. &c. belonging to the insolvent, with a view to obtaining letters of administration; on which the plaintiff inquired what was in the house? She replied 1000*l.* The plaintiff then told her the amount required for administration. On the day of the intestate's death, one of the plaintiffs, Charles Bailey, told the defendant J. M. Gatrill, as the fact was, that he apprehended there had been serious defalcations and frauds committed against the firm; and on the evening of the funeral, the plaintiff waited on Hannah Gatrill, by the appointment of J. M. Gatrill, and requested her to bring him all the money and documents in the house for the purpose of inspecting them; upon which she went up-stairs, and returned with 1595*l.* in notes and gold, also various securities, title-deeds, and documents of large value. The plaintiff then told her of the defalcations and fraud committed by the intestate; and, on expressing his surprise at the amount found in his house, Hannah Gatrill stated she had often said to the intestate that she thought he did not come by it honestly, and had often told him so when he brought money home of an evening. The 1595*l.* and the securities were then delivered to the plaintiff. A search was made in the drawers and desks in the banking-house of which the intestate had the keys, and mining-shares, bills of exchange, promissory notes, and other effects, to a considerable amount, were discovered and taken possession of by the plaintiff, as he considered he had a lien thereon, and it was also necessary that the value should be ascertained for administration.

Sixthly—Hannah Gatrill then instructed the plaintiff to

take the necessary steps for administration of the intestate's estate, and a commission was applied for and sent to Winchester. It was afterwards delayed at the desire of Hannah Gatrill, in order that she might consult her brother and brother-in-law; but, the plaintiffs being alarmed at the large amount due from the intestate, and to secure the application of his estate towards payment of their debt, Charles Bailey obtained from Hannah Gatrill, in May, 1854, the following memorandum:—

"Mrs. Gatrill to give to Mr. J. Wickham, jun., a power of attorney to transact all affairs connected with the administration of the effects of her late husband, and to receive and pay all monies due to or owing from the estate, and to stand possessed of the estate, in trust to pay all debts and sums of money due from him to Wickham & Co. and other parties, and to stand possessed of the residue, in trust to pay over the same to Mrs. Gatrill. Mr. J. M. Gatrill to execute a power of attorney, authorising Mr. J. Wickham, junior, to stand possessed, and to sell and dispose of the freeholds upon the same trusts. Mr. J. Wickham, junior, to covenant that he will perform the above trusts, and, at the expense of the estate, shew to Mrs. Gatrill, in any way she may choose, how the debts have become due. In consideration of the sums of money due from the late Mr. J. R. Gatrill, to Messrs. Wickham & Company, we undertake to carry out the above terms.

Dated 15th May, 1854. HANNAH GATRILL.
JAMES MARKHAM GATRILL."

Seventhly—That, on the signature of the above, Charles Bailey returned to Hannah Gatrill 100*l.*, leaving 1495*l.* in the plaintiffs' hands. Soon after, Mr. J. B. May called on the plaintiff Charles Bailey, stating that he was retained by Mrs. Gatrill, and delivered the following document:—

"Mr. Charles Bailey—Be good enough to give up to Mr. Bowen May all papers, money, and property you have of

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mine, or of my late husband, as Mr. B. May is appointed to act for me as my solicitor.

22nd May, 1854. HANNAH GATRILL."

*Statement.*

No letters of administration had been then granted to her, and the plaintiff, having regard to the circumstances aforesaid, and to the large amount due to the plaintiffs, declined to give up the money and securities, and a correspondence took place between the solicitors.

Eighthly—The defendant Hannah Gatrill claimed to be legal personal representative of the intestate, by virtue of letters of administration she had taken out, and has commenced proceedings in the Court of Queen's Bench by rule nisi to compel the delivery up of the deeds and securities, and has threatened to commence other proceedings; but, under the circumstances, the plaintiffs are desirous the intestate's estate should be administered in this Court; and submit whether they have not a lien on the money, deeds, and documents; yet they are ready to pay the 1495*l.* into Court in trust in this cause, and to deposit the deeds &c.

Ninthly—The plaintiffs are willing and have offered to have the matter amicably settled without resorting to law, and to have the money and deeds deposited with trustees, &c., but the defendants have refused, &c.

Tenthly—The defendants have divers deeds, documents, &c. &c.

The bill therefore prayed—

1. An account of what is due to the plaintiffs and other creditors.

2. The usual accounts of the personal and real estates.

3. That the estate may be applied in payment of what is due to the plaintiffs and other creditors.

4. That the defendants may be restrained from proceeding at law against the plaintiffs in respect of the said money, securities, deeds, and documents, the plaintiffs, and particularly the plaintiff Charles Bailey, to pay the money into Court, and to deposit in Court the deeds, documents, &c. &c.

5. That a receiver may be appointed.

6. That proper inquiries may be made and directions given, and provision made for the costs.

7. That the plaintiffs may have such further relief, &c. &c. &c.

Mr. *Elmsly* and Mr. *J. V. Prior* for the demurring defendants.—The objections to this bill are, that the transactions, as alleged by the bill, between the plaintiffs and their servant disclose a case of felony, which cannot be the foundation of a civil demand: *Cox* v. *Paxton* (*a*). That an embezzlement by a banker's clerk applying to his own use the money or securities of his employers amounts to a felony, there can be no doubt: 7 & 8 Geo. 4, c. 29, s. 47. It was quite clear, therefore, that the plaintiffs could have maintained no action against the clerk for the amount embezzled, a principle of policy interfering; nor could they have compelled an account for it in this Court (*b*). How then could this money or security be considered as the plaintiffs' property in the hands of the defendants. It was submitted, therefore, that the demurrer must be allowed.

The 39 Geo. 3, c. 85, was also referred to (*c*).

Mr. *Malins* and Mr. *J. H. Palmer* for the bill.—It is a fallacy to assume, that, because no action or bill could have been maintained against the deceased before conviction, the property was not recoverable. The rule is, that a man shall not be allowed to make a felony the foundation of a civil action. Not that he shall not maintain a civil action to recover from a third and innocent person that which has been feloniously taken from him; for this he might do if there had not been a sale in market overt; but that he shall not sue the felon alone, or with others, in a proceeding to which the felon was a necessary party therein, where, on his own

(*a*) 17 Ves. 329.
(*b*) Id. 331.
(*c*) Repealed by 7 & 8 Geo. 4, c. 27.

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shewing, his claim appears to be founded on the felony of the defendant: *Stone* v. *Marsh* (*a*). Public policy required that offenders should be brought to justice; and for that reason a man was not permitted to abstain from the prosecution of the felony by receiving back the property or compounding the felony without suit, and of course could not maintain a suit for the same purpose (*b*). That this was the origin of the rule was obvious from the fact, that, *after* conviction, an action was maintainable (*c*): *Crosby* v. *Leng* (*d*), *Ex parte Jones* (*e*), *Marsh* v. *Keating* (*f*), *White* v. *Spettigue* (*g*).

In this case the bill did not allege that the defendants were privy to the embezzlement; the only question, therefore, was, whether the felonious act of the clerk operated to prevent the plaintiffs' following and recovering the property in the hands of innocent parties. It was quite clear it did not.

Then, did the rule, founded on public policy, intercept the plaintiffs' right to sue. The object of the rule, as has been shewn, was to have offenders brought to justice; but in this case the clerk who committed the act alleged to be felonious died before it was discovered, and the prosecution, by the act of God, became impossible. It was submitted, therefore, upon both grounds, that the demurrer must be overruled.

*Judgment.*

The VICE-CHANCELLOR:—

The bill is filed by bankers against the legal personal representative of one of their clerks, who, as the bill alleges, misappropriated their monies to his own use, and concealed that transaction by false entries in the books. The ground of the demurrer is, that, so far as the debt

(*a*) 6 B. & C. 564. Vide *Gibson* v. *Minet*, 1 H. Bl. 612.
(*b*) Ibid.
(*c*) Ibid.
(*d*) 12 East, 409.
(*e*) 3 Deac. & Ch. 525.
(*f*) 1 Bing. N. C. 198.
(*g*) 13 M. & W. 603.

created by the misappropriation was a case of felony; being a case of felony, it cannot be made a ground of this suit. The bill is filed against the legal personal representative. The rule of law, that a felon cannot be sued upon a civil action in respect of a transaction which amounts to felony, is a rule of public policy. The reason of the rule is, that persons who have been defrauded by felonious acts should do their duty to the public by prosecuting for the felony before they seek redress for the private injury to themselves in a civil court. That being the foundation of this rule, it has been said again and again, and was laid down distinctly, by Lord *Tenterden* in *Stone* v. *Marsh* (*a*), that, where public policy ceases to require its operation, the rule ceases to operate also. It was said by the Judges in the House of Lords in the case of *Marsh* v. *Keating* (*b*), that, where criminal proceedings have been instituted in respect of a felonious act, and a civil remedy is sought, the civil right is suspended until justice is satisfied by a prosecution for the felony.

In the present case, the clerk, who committed the act which is said to be felonious, died before the felony was discovered, and the operation of the rule of public policy never was required. The object of the rule being to compel a prosecution for felony before any civil remedy could be sought, this became in the present case impossible, because the felony was not discovered in time to make the prosecution possible.

It would be strange, indeed, if such a defence could prevail in this Court. The assets of this unfortunate person are now in the hands of these defendants. The plaintiffs seek to recover by a civil remedy in this Court the amount in which the clerk died indebted to them in respect of this misappropriation. His assets to a large amount being now in the hands of his representative, it has

(*a*) 6 B. & C. 562. (*b*) 1 Bing. N. C. 217.

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*Judgment.*

been gravely argued before me, that, because the act of misconduct which created the debt amounts to what the law calls felony, although not discovered till after his death, yet that the assets should be retained to answer all other demands except the just demands of these bankers. The rule of public policy does not apply to such cases, and I am very glad that it does not. I must, therefore, overrule this demurrer, and overrule it with costs.

*July* 17*th.*

## BOWDEN *v.* HENDERSON.

The presumption of death, after seven years absence, does not arise, where the probability of intelligence is rebutted by circumstances.

MARTHA JUDD, by her will, dated the 3rd of May, 1834, bequeathed inter alia the sum of 1700*l.* to her sister, Sarah Walker, for life; and after her decease she directed that the dividends should be paid to Joseph Langton the elder and Martha his wife for life; and after the decease of the survivor of them, in trust for all and every the five other children of the said Joseph Langton and Martha his wife, viz. Joseph Langton, Martha Dorville, Letitia Langton, and the defendants Laura Dyson and Charles Langton, in equal shares and proportions.

The testatrix bequeathed the residue of her personal estate to Sarah Walker.

The testatrix died on the 15th of June, 1839. Sarah Walker died on the 27th of December, 1843, having made a will, under which the plaintiff became her sole legal personal representative, and now claimed the one-fifth share in the 1700*l.* stock given by the will of Martha Judd to Letitia Langton, as part of the residue of Martha Judd's estate, on the ground that Letitia Langton must be presumed to have pre-deceased Martha Judd.

The bill stated, that, in 1828 or 1829, Letitia Louisa Langton parted from her family, and left England for France, under the assumed name in her passport of Letitia Lonsdale. She at first resided at Calais, with a Miss Pol-

hill. In 1830 or 1831, she went to Paris, where she took a situation as governess in the family of the Comtesse de Couessen, who resided partly in Paris and partly at Neuvy. Some time between 1831 and 1835, she left that situation to reside with a Miss Anglade in Paris, and subsequently became governess in the family of the Baronne de Combertin, Rue St. Lazare, 88, Chaussée d'Antin, Paris.

The following letters were received by relatives in England from Letitia Langton:—

" 14, Rue Richer, Saturday, 30th of March.

" My dear Caroline,—It is a long time that I have been expecting to hear from you, and cannot imagine the cause of your silence. I fear my letter has not reached you, or that perhaps I forgot to put the address. Let the cause be what it will, I cannot longer remain without writing again. I mentioned in my last letter, that Miss Anglade, who I am with now, is going to England in the month of April. She will stay a month. She goes twice a year, in the months of April and September. If Martha would like Amy to come for three months, it would be a good occasion. If Martha would like to see her when she is in town let me know. I shall profit by her going to get my album. If you have any commissions, you have only to tell me, and she will execute them with pleasure. I have made no new arrangements since I wrote, for the weather has been too cold to go out. Paris is very full. The parties are all finished. The fashions continue the same; the bonnets very small and the skirts very full. There are a great many English families here. I go every Sunday to the Ambassador's chapel, which is very fashionably attended; all the principal people go there. I am quite at a loss for news, leading such a monotonous life. I never go out, except in the garden. I have been better in health here than anywhere since my arrival in France. The air is very wholesome. Pray let me hear immediately on receiv-

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ing this, if you think of Amy's coming, and if you have any commissions for Miss Anglade. Address, 14, Rue Richer, Faubourg Poisonniere, à Paris. I hope you have let the cottage; if you have not, you had better advertise several times; it is not a great expense, and you lose considerably in not having it occupied; and if you do not make it public it is impossible that you can. Now is the season, and I sincerely hope you will let it advantageously; they ought to pay a month in advance, as is the custom here. I was grieved to hear that you were so cheated the last time. You ought to be very particular in learning out the people you let it to. Does Charles continue to apply himself to his studies? I hope he does; if not, he can never expect to succeed. With talents, at all ages, one may obtain something; without them, nothing. I should advertise in the London papers for him; if he neglects to try for something now he will have more difficulty later, being older. Hoping that you are all well, believe me, with kindest love, Yours affectionately, "L. L. L.

Addressed, "Miss Langton, Parnham Lodge,
near Salt Hill, Bucks.
"Angleterre."

"Rue St. Lazare, No. 88, chez Madame la Baronne de Combertin, Chaussée d'Antin, à Paris.

"My dear Martha,—It is a long time since I have heard any news of my family. You will see by the address I have changed my residence. I should not have done so had not the family quitted for Naples, and on that account have placed their child in a school in Paris, where I am. I have the intention of leaving, being too much confined. I have charge of a young girl, fifteen years and a half old, who I can never leave for an instant. I have a situation in view; it appears highly advantageous; it is for a widower, who has a daughter eight years of age. I should not, of course, accept it if his sister did not live in the house. He lives six months in Paris and six in Normandy. He wishes

me to give references, naturally enough, to some one in England. I know of no one but my own family. He wishes for some one accustomed to manage a house. I told him (taking a liberty which I hope you will pardon me for saying) I had directed to your house, not knowing of any other; and it is a point absolutely necessary that I should have directed to some one's. He has taken your address. He is the most particular man I ever saw; he will know the why and the wherefore of everything. You need only reply that I am perfectly competent to undertake the situation. You need not say the time I have been in France; say several years, which will prevent your telling untruths. Nor need you name how many families I have been in, being injurious changing so often. You may say I was institutrice at Madame la Comtesse Couessen, and that I am now with the Baronne de Combertin. He has been told by a friend in my interest that my father was a clergyman, so you need not contradict it. If he mentions the subject, say nothing; and it will appear as if you had forgotten it. I am sure you will be surprised to hear I am become a Catholic; it is a subject too long to enter upon. If he asks you how long I have changed my religion, you need not say any precise time. I give you all these hints, being desirous that my story and yours should agree. That there may be no misunderstanding, be as explicit as you can, which is always best in affairs of this kind. You will not write to him before you receive his letter. His address is, Monsr. de Bonbutier, No. 3, Rue Ventadour, à Paris. I am not sure if I have spelt his name right. I intend writing to Caroline when I have finished this. I hope they are all well, and more happy than they have been. I suppose you see them sometimes, which must be a great pleasure and consolation for the whole family. I suppose you have given up the idea of ever visiting France again. If it should be the case I much regret it, living here is so cheap. A person with economy and three hundred a year may

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keep their carriage. The fashions are much the same; quite young girls wear their hair braided, a la grec, or with one large curl at the side; those two ways are merely for girls of eighteen or nineteen. Plaits are worn, but in full dress; mantles and Scotch wittles; black velvet bonnets, not very large. I hope soon you will answer this; if you defer it longer than a fortnight, perhaps I shall not be here. I am very anxious to hear the result of your correspondence with the gentleman. Tell me the address of the Uxbridge people. I shall direct [here the seal has torn the paper] my address to Caroline, at their old address a Appenham Court, not knowing of their other. I hope it will arrive safe.

Addressed,

"Mrs. Dorville, 6, Wyndham-place,
"London,
"Angleterre."

Letter from Letitia Louisa Langton, in the bill named, to the defendant Caroline Langton, without date, but bearing the post-office stamp, February 13th, 1835:—

"Rue St. Lazare, No. 88, chez Madame la Baronne de Combertin, Chaussée d'Antin, à Paris.

"My dear Caroline,—It is a long time since I have heard any news of my family. You will see by the address I have changed my residence. I should not have done so had not the family quitted for Naples, and on that account they have put their daughter to school. Where I am I have charge of a young girl fifteen years and a half old, who I can never leave for an instant. I have a situation in view, which appears highly advantageous; it is for a widower, who has a daughter eight years old. I should not have accepted it, of course, if his sister did not live in the house. He lives six months in Paris and six months in Normandy. He wishes me to give references, naturally enough, to some one in England. I know of no one but my own family. He wishes for some one accustomed to manage a house. I have given references to Martha, trust-

ing she will be good enough to answer for me. He is very particular, and will know the why and the wherefore of everything. If I obtain the situation I will write to you immediately. I sincerely hope you are more comfortable than you have been for some time past, and that you are all in good health. The fashions continue the same. The hair worn off the forehead, and plaited low on the head; black velvet bonnets and Scotch wittles; the gowns very long, and the sleeves very large at the wrist. Let me hear from you soon; if you defer it long, perhaps I shall have left. Adieu! Kindest love to all.—Your affectionate,

" L. L. L.

" Colnbrook,
" Re-direct from Penny Post,
" Miss Langton,
" ~~Appenham Court,~~
" ~~near~~ Salt ~~Hill,~~
" ~~Bucks,~~
" Angleterre."
" Hillingden, near Uxbridge."

Application had been made to the Baronne de Combertin, who stated that Letitia Langton had left her house in a hackney coach, but she knew not whither. It was also stated, that Letitia Langton had been met in the streets of Paris by the Baron de Combertin.

Search had been made at the register of deaths in Paris from 1835, but it was certified that no "Acte de deces" of Letitia Lonsdale was on the register.

An advertisement for her, by the name of Lonsdale, had been inserted in the Presse newspaper, in Paris, on the 2nd of February, 1851, offering a reward for intelligence respecting her.

Application had also been made to the police in Paris, but no information could be obtained on the subject.

Application had been made to the proper tribunal at Arcis sur Aube, but no intelligence could be obtained of her or of M. Bonbutier, the gentleman mentioned in her letter.

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*Statement.*

It was in evidence, that, on the receipt of the letter from Letitia Langton, stating that she had abandoned the Protestant religion, her sister addressed to her at Paris a letter of remonstrance and reproach at her conduct, which was addressed to her at the residence of Madame la Baronne de Combertin; but that no reply had ever been received to such letter.

*Argument.*

Mr. *Elmsly* and Mr. *W. D. Lewis*, for the petitioner, asked that the share of Letitia Langton might be paid to her next of kin. In the case of *Dowley* v. *Winfield* (*a*), where A. went abroad in September, 1830, and his father died in September, 1833, and nothing was heard of A. for about fourteen years from a year and a half before his father's death, the Court presumed his death at the date of the death of his father, and ordered A.'s share in his father's property to be paid to his brother, the latter giving security to refund it in case A. should have survived his father.

Mr. *Goodeve* appeared for the executors.

Mr. *Bacon* and Mr. *Shebbeare* for other parties.

*Judgment.*

The VICE CHANCELLOR:—

The principle on which the Court presumes the death of a person of whom no tidings have been received for a long period of time, is this,—that, if he were living, he would probably have communicated with some of his friends and relatives. It is a conclusion which the Court draws from the probabilities of the case. It is quite clear, therefore, that, when no such probability exists, the presumption cannot arise.

In this case, all the circumstances tend to shew, that, after what had taken place between Letitia Langton and her friends, it was extremely improbable she would have entered into further communication with them. She had abandoned her religion, and her friends wrote to her a let-

(*a*) 14 Sim. 277.

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ter of remonstrance and reproach for so doing. These reproaches were not calculated to encourage further communications. I think this circumstance, taken in connection with the rather eccentric course of life, which, it appears from her letters, she pursued, render it improbable that she would have further communicated with her friends. If I am right in this view, it follows, that the presumption of her death does not arise from the absence of information or of communication, when that absence is natural, even if the lady were still alive. There must, therefore, be further inquiry.

*Re Rabeyne v Barclay 23 Beav. 107.*

*Aug. 2nd.*

## IN RE LAWRENCE, CROWDY, AND BOWLBY; EX PARTE BURDON.

Where a client had corresponded and dealt exclusively with one only out of a partnership of three solicitors, and remitted a sum of money to that one alone, although desired by him to remit the money to the firm, a motion against all three partners, under the summary jurisdiction of the Court to compel them to pay the money, refused as to the two partners who had thus been excluded from the fair means of the knowledge of the remittance.

The summary jurisdiction of the Court over its officers extends to relief only in cases of personal misconduct and neglect of duty.

A solicitor, who allows his name to be used by others conducting in his name the business of solicitors incurs the peril of personal responsibility.

THIS was a motion on notice by Rowland Burdon, of Castle Eden, Durham, under the summary jurisdiction of the Court over solicitors, "that Benjamin Lawrence, James Crowdy, and Thomas William Bowlby, and each of them, jointly and severally, may, within three days after the service of the order to be made on the motion, pay into Court, in trust in the cause of *Hamilton* v. *Burdon*, the sum of 5777*l.* 7*s.* 4*d.*, with interest at 5*l.* per cent. from the 28th of February, 1853; and also, within such three days, pay to the said Rowland Burdon the sum of 1294*l.* 13*s.* 11*d.*: with interest at 5*l.* per cent. on the sum of 282*l.* 8*s.* 6*d.*, part of such sum, from the 14th of May, 1852; on the sum of 86*l.* 14*s.* 7*d.*, further part thereof, from the 2nd of December, 1852; on the sum of 115*l.* 14*s.* 2*d.*, further part thereof, from the 8th of July, 1852; and on the sum of

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809*l.* 16*s.* 8*d.*, the remaining part thereof, from the 14th of June, 1854."

It appeared, from the affidavits, that Mr. R. Burdon, as executor of his testatrix, had been made a defendant in the suit of *Hamilton* v. *Burdon*, and had employed as his solicitors in such suit the firm of Lawrence, Crowdy, & Bowlby, who, previously to December, 1853, carried on business at 25, Old Fish Street, Doctors' Commons; but that Thomas William Bowlby had acted for him in the course of the suit. Numerous letters were written by Mr. Burdon, which were always addressed by him to Mr. Bowlby. The latter gentleman uniformly dated his letters from the place of business of the firm, and occasionally signed his own name, but more frequently that of the firm.

In the early part of 1853 the principal portion of the personal estate belonging to the testatrix had been paid by Mr. Burdon into Court.

On the 12th of May, 1852, Mr. Bowlby sent to Mr. Burdon a letter, stating, that no creditor had come in under the advertisement; and that, the time being expired, the Master had directed the balance at Hoares' bank, which had been accumulated from dividends, to be paid into Court and invested in Consols, and added to the other fund, "you [Mr. Burdon] retaining in your hands for the present the balance arising from the railway shares, &c. &c., to meet the current expenses." The letter concluded thus:—

"Will you therefore send us a crossed cheque on Hoares for 662*l.* 13*s.* in their hands, and we will pay it into Court, and bespeak the Accountant-General's directions to invest it.

"I am, dear Sir, yours very truly,

"T. W. BOWLBY."

Mr. Burdon received the above letter on the 13th of May, 1852, and on the same day he sent Mr. Bowlby a cheque for 662*l.* 13*s.*, which he at that time supposed to be the amount remaining in his hands due to the testatrix's estate, in order

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that it might be paid into Court. He subsequently, however, ascertained that he had paid 380*l.* 4*s.* 6*d.* too much, and he afterwards retained that sum out of other monies received from the estate of the testatrix. On the 2nd of December, 1852, Mr. Burdon sent to Bowlby a further sum of 86*l.* 14*s.* 7*d.* on account of the testatrix's estate. Bowlby in July, 1853, addressed a letter to Mr. Burdon, which contained the following passage:—

"The two sums of 662*l.* 13*s.* and 86*l.* 14*s.* 7*d.*, sent to me, were paid into Court in the name of the Accountant-General, and invested by him."

On the 3rd of August, 1852, the Court having directed railway and stock shares to be sold, they were sold by Mr. Burdon, and the proceeds, amounting to 1485*l.* 3*s.*, paid into his bankers. Bowlby subsequently applied to Mr. Burdon to have the residue of the testatrix's estate paid into Court. In consequence of this application, Mr. Burdon, on the 13th of January, 1853, forwarded to Bowlby two cheques, payable to himself, one on Hoares' bank for 1104*l.* 18*s.* 6*d.*, and the other on the Royal British Bank, for 4292*l.* 4*s.* 4*d.*, which it was subsequently ascertained had been paid in cash to Bowlby on the 28th and the 21st of January. Mr. Burdon wrote to Bowlby to know whether the first had been paid into Court and invested, when he was assured that it had. On the 11th of June, 1853, he forwarded to Mr. Burdon a power of attorney, authorising James Crowdy and Thomas William Bowlby to receive 800*l.*, in order to enable the attornies to receive from the Accountant-General 800*l.*, with a view to pay the same to the Guardian and Provident Insurance Companies, pursuant to an order in the cause, dated the 3rd of August, 1852. Bowlby's letter contained the following passage:—

"The power will enable us to receive the principal sum

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of 800*l.*, to be paid to the offices, due in March last, and paid by us. It will also enable us to receive the premiums year by year as they become due."

Mr. Burdon executed the power of attorney; and it was subsequently ascertained that Bowlby obtained payment from the Accountant-General on the 14th of June, 1853, but did not pay the same to the insurance companies. On the 27th of July, 1853, he sent to Bowlby a further sum of 115*l.* 14*s.* 2*d.*, in order that it might be paid into Court; of which 23*l.* 2*s.* 5*d.* was paid by Bowlby in September, 1853, to Mr. Burdon's account at Hoares' bank.

In June, 1854, Mr. Burdon ascertained that Bowlby had paid none of the monies remitted to him into Court, but had applied them to his own use. On the 15th of June, 1854, Mr. Burdon paid to the insurance companies out of his own monies the sum of 809*l.* 16*s.* 8*d.*, for principal and interest. In May, 1854, he learned, for the first time, that Lawrence was only a nominal partner in the firm.

It appeared, from the affidavits made in opposition to the motion, that Mr. Lawrence was and had been merely a nominal partner in the firm; that Mr. Crowdy was wholly ignorant of the transactions between Mr. Burdon and Mr. Bowlby; and that Bowlby had ceased to be a partner in December, 1853.

Mr. *Bacon* and Mr. *F. Riddell* for the motion.—There could be no doubt that this Court exercised summary jurisdiction over solicitors as a speedier remedy than leaving the client to an action: *Floyd* v. *Nangle* (*a*). In *Ex parte Earl of Uxbridge* (*b*), the Court, under its summary jurisdiction, ordered a solicitor to deliver up title deeds deposited with him by his client on payment of his bill. The same principle was acted on by Lord *Gifford* in

(*a*) 3 Atk. 568. (*b*) 6 Ves. 425.

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*Argument.*

*Re Murray* (*a*). The rule upon which the Court acted was well defined by Lord *Tenterden* in the case of *Re Aitkin* (*b*): "The rule by which the Court are to be governed in excercising their summary jurisdiction over its officers seems to be this: where an attorney is employed in a matter wholly unconnected with his professional character, the Court will not interfere in a summary way to compel him to exercise faithfully the trust reposed in him. But where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, there the Court would exercise this jurisdiction. It was not necessary that the solicitor should be employed in any suit or action" (*c*). That this Court had summary jurisdiction to make the order now asked was beyond question: *Re Foljambe* (*d*). But then it will be contended, that Messrs. Crowdy and Lawrence are not liable to Mr. Burdon, because of the dissolution, which took place in December; but it was well established, "that solicitors in partnership cannot dissolve partnership as against their client without his consent. Neither could they divide their business, considering one only as the agent to the other, because the client was entitled to their united exertions:" *Earl of Cholmondely* v. *Clinton* (*e*).

Then it would be said, that the fraud was the act of Bowlby, without the knowledge of his partners: and that they were not liable for his act. But, even assuming that they were personally ignorant of the whole transaction, and had derived no benefit from the fraud, still they were bound by the representation of their partner, such representation relating to a matter within the limit of the partnership business: *Blair* v. *Bromley* (*f*), *Brydges* v. *Bran-*

(*a*) 1 Russ. 519.
(*b*) 4 B. & Ald. 49.
(*c*) Ibid.
(*d*) 9 Beav. 402.
(*e*) 19 Ves. 272, n. (*a*).
(*f*) 2 Ph. 354.

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*fil*(*a*), *Ford* v. *Thomas* (*b*).—Collyer on Partnership, p. 259, was also cited.

*Argument.*

Mr. *Wickens* appeared for Mr. Crowdy.

Mr. *Malins* and Mr. *Cairns*, for Mr. Lawrence, contended, that Mr. Burdon was a personal friend of Mr. Bowlby, and had elected to deal with him alone. It was quite clear, therefore, that the other partners were not liable: *Hasleham* v. *Young* (*c*).

*Judgment.*

The VICE CHANCELLOR:—

This is a case of great importance, and it is attended by some singular circumstances. The application is against three individuals, officers of the Court, for the payment of a sum of money which was remitted to one of them for the purpose of being paid into Court. There is no doubt that a solicitor, who is an officer of the Court, receiving money to be paid into Court, and not paying it, is guilty of misconduct and neglect of duty; and that, under the summary jurisdiction over him as its own officer, this Court can compel him to repay the money.

The question here is free from any difficulty as to the jurisdiction of the Court in that respect. The difficulty of those who support this application is, that it is an application against three individuals, that each of them should be considered as guilty of personal misconduct and personal neglect of duty in respect of the nonpayment of the money, which is only proved to have reached the hands of one of them. If I were at liberty to treat the case as one in which the money can be held as having constructively reached the hands of all three, Mr. Burdon, who makes this application, would be entitled to an order that all three should be compelled to pay the money. The difficulty in his case is to

(*a*) 12 Sim. 369. (*b*) 8 Dowl. P. C. 684. (*c*) 5 Q. B. 833.

shew that there has been misconduct by any one of the three except Bowlby.

It is only by an application of the principle of the law of partnership that the other two can be held to be liable. But the summary jurisdiction of the Court is an entirely personal jurisdiction, and is intended to give relief in cases of personal misconduct and personal neglect of duty. In cases of that kind there is a jurisdiction to compel the performance of duty.

In support of this application, it is said that these three individuals carried on business as partners, and were, as partners, in this suit the solicitors of Mr. Burdon; and to that extent the case of Mr. Burdon against the three would be entirely sustainable but for a difficulty created by his own conduct, voluntarily pursued. The duty of solicitors is one that necessarily involves a great degree of personal confidence. The duty of a firm of solicitors, as discharged by a firm, can only be discharged by one member of the firm efficiently, or by means of an agent, an individual clerk or servant acting as agent for all. The singularity of this case is, not that Mr. Burdon merely corresponded with one member of the firm, and did not address his letters to the firm, but that he never corresponded with any member of the firm at all except Bowlby; and when Bowlby, in regard to this particular remittance, by letter requested Mr. Burdon to remit to "us," *i. e.* the firm, Mr. Burdon voluntarily, by his own act, did not trust the firm, but trusted Bowlby, by sending the money to Bowlby alone, and not to the firm as Bowlby required. He sent the cheques, and gave the control of the money, to Bowlby singly and individually. I apprehend, especially on a question of this kind, that when a person employing a partnership of solicitors does conduct his dealings with one member of that partnership, on such a footing as that the other members of the partnership have not the ordinary means of knowing what was done between the client and their partner, which they otherwise would have had if the money had been remitted to the firm or the letters addressed to them-

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selves, it is too much to say, that the person so dealing has a right of personal complaint against those whom he thus kept in ignorance. Persons who voluntarily deal with an individual partner, so as to put the nature of the transaction between them less within the knowledge of the other partners than it would be if the business were conducted in the ordinary way, cannot complain against those to whom no knowledge of that particular transaction is brought personally home. Under such circumstances, I apprehend the person who voluntarily so deals with a member of the partnership must bear the consequences of that individual partner's misconduct, which he has not given to the other members of the firm the opportunity of preventing.

I beg it may be distinctly understood, that I dispose of this case upon the footing, that, by his own acts and conduct, Mr. Burdon so conducted himself, that he did not give the other partners the opportunity of knowing what was going on between him and Bowlby. The case I admit to be one of extreme difficulty, attended with circumstances of great singularity; for, as to one of these individuals, (Mr. Lawrence), a course was pursued, which, I think, eminently requires the attention of the Court. This gentleman chose to allow his name to be used by other individuals, who were to conduct, in his name, the business of solicitors; and this gentleman allowed himself to be represented as an officer of the Court, when he was not transacting any business as such officer. I think that any person who places himself in that situation incurs a great responsibility; and if the case here had been merely that of Mr. Lawrence, I should have had greater difficulty than I feel upon it. But when I consider that Mr. Lawrence was, in this case, a partner with Crowdy, and that the conduct of Mr. Burdon, with reference to the partnership, was such as, in my opinion, to deprive the partnership of the fair and proper opportunity which Bowlby invited—if I held that Crowdy, who was an active partner, is absolved by the conduct of Mr. Burdon, I see no ground, however I may

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disapprove of the conduct of Mr. Lawrence, by which I can hold that he (Mr. Lawrence) is liable when Crowdy is absolved. The principle of my decision is, that Mr. Burdon, by his own conduct, deprived himself of that right against the other members of this firm, to which he would otherwise have been entitled. This application under the summary jurisdiction of the Court to establish the case of personal misconduct and personal neglect of duty by Lawrence and Crowdy, seems to me, from the conduct of Mr. Burdon, entirely to fail. I must refuse the order against Mr. Crowdy and Mr. Lawrence. The right to the order against Bowlby is clear; for that he has been guilty of neglect of duty and personal misconduct is perfectly plain. I shall give no costs on either side.

Richards v. R. 29 L. J. Ex. 836. 6 C. B.

## GOODALE *v.* GAWTHORNE.

*Aug. 3rd.*

A. being seised of real estate died, leaving his sisters his presumptive co-heirs, his wife being enceinte of a son, born subsequently. The rents, from the ancestor's death, remaining unreceived by the co-heirs: —*Held*, that their seisin being gone on the birth of the posthumous child, they were not entitled to so much of the intermediate rents as they had not received before the birth of the heir.

THIS was the petition of Elizabeth Goodale, and of Mrs. Moss late Goodale, and her husband, praying that the sum of 273*l.* 2*s.* 10*d.* Consols, and 35*l.* cash, might be divided into thirds, and two-thirds thereof paid to the petitioners.

John Goodale, who was possessed of certain real estate in the county of Derby, died, on the 1st of April, as to the real estate now in question, intestate. At his death, his widow was enceinte of a son, who was born on the 29th of October, 1848. At the death of John Goodale, his sisters, the petitioners, were his presumptive co-heiresses at law.

A suit was instituted on the 18th of November, 1848, to administer the estate of John Goodale; and on the 12th of January, 1850, it was referred to the Master, to inquire and state what proportions of the rents and profits of the real estates of John Goodale, deceased, had been received by the trustees between the death of John Goodale and the

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birth of the posthumous son. On the 11th of February, 1850, Master *Dowdeswell* certified that the sum of 261*l.* 3*s.* 10*d.* had been so received and paid into Court.

*Statement.*

On the 11th of June, 1851, the widow of John Goodale elected to take an annuity secured by a bond of John Goodale, and her dower, instead of an annuity and legacy given by the will.

The question now raised was, whether the petitioners were entitled to two-thirds of the fund in Court, which arose from rents accruing between the death of the ancestor and the birth of the posthumous heir.

*Argument.*

Mr. *Wigram* and Mr. *E. Webster* for the petitioners.—It was settled, that, "where a man has issue a daughter and dies, his wife being 'encient,' the daughter may lawfully enter, and if she dies, her heir may enter and take the profits for the time; and afterwards, if the wife, being 'encient' by the ancestor paramount, is delivered of a son, the son may enter, notwithstanding that the heir of his sister is in by descent; but he shall not have an action of account or any remedy for the issues in the meantime before his birth, because that their entry was congeable until he was born;" and the rent which was due belonged to the daughters, who were seised: *Goodtitle* v. *Newman* (*a*). In the case of *Bassett* v. *Bassett* (*b*), Lord *Hardwicke* held, that the posthumous son was entitled to the profits of the descended estate only from his birth.

Mr. *Goodeve* and Mr. *Selwyn* appeared for other parties.

Mr. *Amphlett* for the heir-at-law, but was not called on.

(*a*) 3 Wils. 526, by Chief Justice *De Grey*, citing the opinion of Chief Justice *Babington*, Year Book, 9 Hen. 6, 25 *a*, *c*.

(*b*) 3 Atk. 202. In this case Lord *Hardwicke* held, that a posthumous son, claiming under a settlement, was, by construction of the 10 & 11 Will. 3, c. 116, entitled to the profits from the death of the ancestor; but he held, that, as to profits of the *descended* estates actually *received*, the heir was entitled to an account only from his birth. See, also, *Bullock* v. *Stones*, 2 Ves. sen. 521; Co. Lit. 11. b.

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*Judgment.*

The VICE-CHANCELLOR :—

The right of the sisters is admitted by counsel very properly to depend on their having been actually seised of the estate as heirs. The seisin being in them from the death of the ancestor up to the birth of the posthumous son, they were heirs in contemplation of law so long as the posthumous heir was unborn. Lord Coke, in his Commentary, 11. b., says that the descent cast upon the presumptive heir until the posthumous heir is born, does not confer an absolute heirship, but only one of a qualified kind. His words are (the case being that of an uncle), "True it is that the uncle in this case is heir, but not absolutely heir." It is certain that on the birth of the posthumous child, there was an end to the qualified seisin and to all right of entry on the part of the sisters, who had the qualified heirship until the birth of the posthumous child.

The law is settled, that, if during the period of this qualified heirship and seisin in the sisters they had entered and had received the rents, as they might have done, an action of account would not lie against them, and they would be entitled to retain what they had received, and which they had lawfully acquired.

If, however, they did not obtain possession of such rents, but the rents had remained unreceived by them, their seisin being gone on the birth of the posthumous child before they had received the fruits of their seisin—viz. the rents, the right to the rents in such case is in the absolute heir, who has a right to enter and distrain for them. That is what I infer from the principle as stated by Lord Coke; and the law, as settled in the case of *Doe* v. *Clarke* (*a*), considers an infant en ventre sa mere as born for all purposes which are for his benefit. Then, it is said, they might bring an action for the rent, but no authority has

(*a*) 2 H. Bla. 399.

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been cited in support of that proposition; and I apprehend that it would be impossible for them to maintain an action for the rent which the absolute heir had a right to recover by entry and distress, as the proper owner of the freehold. Therefore there must be a declaration that the sisters are not entitled to the rents, which are the property of the posthumous son.

Costs of all parties out of the fund.

See *Trower* v. *Butts*, 1 S. & S. 184, where Sir *John Leach* notices that in *Lancashire* v. *Lancashire*, 5 T. R. 49, one of the Judges referred to the maxim of the civil law, that, when the birth of a child happens after the death of a parent, it is, by fiction of law, refered back to his lifetime. Vinnius says, "Fictione juris nativitas retrotrahitur:" 5 T. R. 59. "A posthumous child," said Mr. Justice *Grose*, "must be considered in the same situation and entitled to the same benefits as a child born during the life of the parent:" Id. 64.

*July* 21*st*.

## FERRIS *v.* MULLINS.

The secretary of a banking company had a credit account with the bank to the extent of 3000*l*., secured by a memorandum, specifying certain securities deposited by way of equitable mortgage. On his dying a debtor to the bank in 4000*l*., there was found in his office in the banking house the securities mentioned in the memorandum, with others, tied in a bundle, and indorsed and labeled as securities. There was evidence that he had stated that the bank was secured in 5000*l*.:—*Held*, that the bank was equitable mortgagee of all the securities.

THIS was a petition by the Royal British Bank, praying that the sum of 3429*l*. 7*s*. 4*d*., standing to the credit of the cause intitled "Ex parte the Equitable Claim of the Royal British Bank," might be paid to their secretary and solicitor, Richard Paddison, on account and in part discharge of the claim of the bank, under the memorandum of the 1st of August, 1850; the petitioners being willing and hereby offering to deal with the other securities held by the bank as this Honourable Court shall direct, and that the order may be made without prejudice to the other claims of the bank against the estate of the said George Mullins.

The suit was instituted by the plaintiff, who was a creditor of George Mullins, on behalf of himself and all other

creditors. Under a decree made at the hearing of the cause, the bank had carried in a claim for 4000*l.*, which had been allowed. By an order made by his Honour on the 27th of April, 1854, the bank, by their secretary, conjointly with Eliza Mullins, the executrix of Edward Mullins, was authorised to receive the proceeds of certain policies of assurance on which the bank claimed a lien: and in pursuance of such order, the secretary and Eliza Mullins received from the Imperial Assurance Company the sum of 1432*l.* 9*s.* 4*d.*, and from the Royal Insurance Company the sum of 1996*l.* 18*s.*, which were paid by them into Court, and constituted the fund which was the object of the present petition.

It appeared on the affidavits, that Edward Mullins, the testator in the cause, on and prior to the 1st of August, 1850, was and had been, jointly with Mr. Paddison, the solicitor and secretary of the bank. As such solicitor and secretary, he had an office at 16, Tokenhouse-yard, where the business of the bank was carried on, containing a repository, of which he, being secretary, kept the key.

On the 1st of August, 1850, the following memorandum, bearing that date, was executed under the hand and seal of the testator, by which he acknowledged, that, in consideration of the Royal British Bank having agreed to allow him credit, on an account to be kept in his name in the books of the bank, at their head office, to the extent of 3000*l.*, he, the said Edward Mullins, had that day given his promissory note, bearing date the 25th of July, 1850, to the said bank, for the same sum, payable to them or their order three months after demand; and had deposited with the said bank a policy of assurance on his own life, granted by the Royal Insurance Company, dated the 3rd of November, 1849 (numbered 465), for the sum of 999*l.*; and also a policy of assurance on his own life in the Merchant and Tradesman's Life Assurance Society, dated 26th of January, 1849 (numbered, &c.), for 499*l.* 19*s.*; also a policy in the Imperial Life Assurance Company, dated 1st of August, 1850,

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*Statement.*

for 1500*l.* (numbered 5931); also an assignment of a policy on the life of Mary Jane Mullins, in the Economic, for 150*l.*; to which said several policies the said Edward Mullins was well entitled, and for such security as thereinafter mentioned did, by the same memorandum, for himself, his heirs, executors, and administrators, covenant and declare with the said bank, their successors and assigns, that such promissory note has been given and such policies of assurance deposited as aforesaid, and that the same and all monies assured or to become payable by virtue thereof, and the full benefit thereof, and all the estate and interest of the said Edward Mullins in the same premises and every part thereof, "should enure as a continuing as well as a present security to the said Royal British Bank, their successors and assigns, for the repayment of any principal sum or sums of money, subject to such limitation of amount as therein mentioned, which might at any time thereafter, and from time to time, be owing by the said Edward Mullins to the said Royal British Bank, their successors or assigns, on the balance of the said account current; and also for the repayment of any sum or sums of money, subject to such limitation as aforesaid, which the said bank might have advanced or might thereafter advance, or which the said bank had or might thereafter become engaged for on account of the said Edward Mullins, either solely or jointly with others, on or by any bill of exchange, drawn, accepted, or indorsed, or any promissory note drawn or indorsed by the said Edward Mullins, or for the payment of which the said Edward Mullins should have in any way become responsible, either solely or jointly with others; or on or by any bond, contract, letter of credit, guarantee, or other obligation, or in any other way whatsoever; as well as for the reimbursement by the said Edward Mullins, his executors or administrators, to the said Royal British Bank, their successors or assigns, of the amount of any loss or expense, subject to such limitation as aforesaid, which the said bank might sustain or endure by or through their banking trans-

actions with the said Edward Mullins; any or every such repayment or reimbursement to be made whensoever the same might be demanded by or on behalf of the said Royal British Bank, their successors or assigns, such demand to be made as therein mentioned, with interest at the rate of 5*l.* per cent. per annum, or at such higher rate as the said bank might for the time being fix, or might be fixed either by advertisement in the newspapers or notice exhibited in a conspicuous part of the public office of the said bank, or might otherwise stipulate, to be paid by the said Edward Mullins on all such monies from the several times when the same should have been advanced, with interest until the repayment thereof, with commission and other charges on the amount of the said credit or the transactions in the said account as the said bank might usually charge on such credits; the whole amount of money to be ultimately recoverable upon that security, exclusive of any sum or sums of money to be charged for commission, or to be paid or advanced for any purpose, as thereinbefore mentioned, being, nevertheless, thereby limited not to exceed the sum of 4000*l.** Provided always, that neither the said deposit nor anything therein contained should prevent the said bank from taking proceedings against the said Edward Mullins upon the promissory note, as well as upon that agreement, for any deficiency that might arise on the said banking account, from the inadequacy of that security to meet the same, or in anywise relating to the security. And the said Edward Mullins did thereby, for himself, his heirs, executors, and administrators, covenant with the said bank, their successors and assigns, that he the said Edward Mullins, his executors or administrators, would, on demand made as aforesaid, repay to the said bank, their successors and assigns, all and every the sum or sums of money which should be then due to them from him, his executors or administrators."

At the date of the memorandum, Edward Mullins de-

* *Sic* in Memorandum.

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posited with the bank the policies of insurance, dated respectively, on the 3rd of November, 1849, in the Royal Insurance, for 999*l.*; on the 26th of January, 1849, in the Merchant and Tradesman's Insurance, for 499*l.* 19*s.*; on the 1st of August, 1850, in the Imperial, for 1500*l.*; and also the assignment of the policy in the Economic, for 150*l.* These were the policies specified in the memorandum of agreement.

But after the execution of the memorandum, he deposited with the bank a policy of insurance on his own life in the Royal Insurance, dated 18th May, 1851, No. 786, for 1000*l.*; and also the title deeds of an estate at Box; and the lease of a house, 1, Great James-street, Bedford-row, since given up; and a memorandum of charge by Davis, in favour of Mullins, on land at Battersea. It was to these securities, not specified in the memorandum, that the question on this petition arose. They were all tied up in the same bundle with the securities specified in the memorandum. They all of them were found in the repository of the bank under Mullins' charge, in the secretary's office. The fund sought to be dealt with by this petition was composed partly of the amount paid on the policies specified in the memorandum, and partly on the policy for 1000*l.*, which was not therein mentioned.

It appeared from the affidavits, that Edward Mullins had in the secretary's office a repository under his custody, in which, upon search being made after his death, there was found in a drawer in the repository, among other securities belonging to the bank, several deeds and insurance policies and other documents, tied together in one parcel, with a document on the outside of the parcel, having an indorsement which served as a label to such parcel, and being as follows:—

> "Cash credit security, policy, dated 1st of August, 1850, 3000*l.* Edward Mullins to the Royal British Bank."

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Within the parcel were the policy in the Royal Insurance, for 999*l.*; the policy for 1000*l.*, not mentioned in the agreement; also that in the Imperial Assurance, dated 1850, for 1500*l.*; also the title deeds relating to the Box property in Wiltshire belonging to the said E. Mullins, and the lease of his house in Great James-street.

It appeared from the affidavit of E. G. Mullins, a nephew of E. Mullins and a clerk in the bank, that, about a year before his death, he the deponent had informed E. Mullins that he had drawn on his cash credit account beyond the sum of 3000*l.*, upon which occasion he had stated to the deponent that the overdraft was of no consequence, for that the bank held securities for his cash credit account to the amount of upwards of 5000*l.*

At his death, E. Mullins was indebted to the bank in a sum of 4000*l.*

*Argument.*

Mr. *Bacon* and Mr. *F. T. White* for the petitioners.—The bank was entitled to an equitable mortgage of all the securities which were found tied together and indorsed by Mullins "Cash credit security, policy, dated August 1st, 1850, 3000*l.* Edward Mullins to the Royal British Bank." Mullins was the officer of the bank; and had there been any doubt as to his intention to include all the securities which were found so tied together, such doubt would have been removed by the statement made by Mullins to his own nephew, that the bank held securities from him for 5000*l.* and upwards.—They cited *Ex parte Skinner* (*a*).

Mr. *Craig* and Mr. *W. F. Bristowe* for the defendant, the widow.—The deeds and policies in question were in the separate custody of Mullins, and never were in the custody of the bank, or of Mullins as officer of the bank. As the bank held a memorandum enumerating the specific articles charged by Mullins, strong evidence must be ad-

(*a*) 1 Deac. & Chit. 403.

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duced to shew that any deeds or documents *not* mentioned in such memorandum were intended to be charged by it. The evidence which was adduced by the clerk, viz. the statement by Mullins that the bank held securities for 5000*l.* and upwards, was not sufficient evidence to induce the Court to include in the charge anything not included in the memorandum.

Mr. *Speed* for the plaintiff, a creditor, whose security was insufficient, contended that there never was any actual delivery to the bank of the securities in question, and therefore that the claim by the bank to anything not in the memorandum could not be supported.—He cited *Ex parte Coming* (*a*).

*Judgment.*

The VICE-CHANCELLOR:—

The evidence here is all on one side. The question is, whether the petitioners, the Royal British Bank, have, as between themselves and the creditors of Mullins, a lien upon these deeds, especially upon the policy of assurance for 1000*l.*, by way of equitable mortgage? The case is, that Mullins, the debtor to the bank, whose debt to the bank was secured by the deposit of these deeds, was himself an officer of the bank—one of their joint secretaries. That there were transactions between him and the bank, in the course of which there was a deposit of certain deeds to secure the balance due from him as upon a cash account, is not disputed. The only question is, whether this policy of assurance, not mentioned in the memorandum of deposit, is subject to a lien on the part of the bank? It appears that the advances made by the bank exceeded the amount stipulated for upon the first deposit and mentioned in the memorandum. It appears also, that another officer of the bank noticed the excess of the advances made to Mr. Mullins; but that Mr. Mullins said the bank had sufficient secu-

(*a*) 9 Ves. 115.

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rity. Applying that expression to the transaction, it can only mean this, that he referred to further security for the further advances beyond the amount mentioned in the memorandum of deposit; the expression would otherwise have no meaning. But the case goes far beyond that, because it appears that the policy of assurance was found tied up in the same bundle with the other deeds, and in the same custody, and on the outside of the bundle was the original memorandum of deposit, describing it as the security for the cash credit. An attempt has been made to shew that the custody of the whole of the deeds included in the bundle was not the custody of the bank, but that they remained in the custody of the debtor, Mr. Mullins. The bundle was found in a drawer in the office at the bank. That circumstance alone would prove them to be in the custody of the bank. But it was said that the office in which was the drawer in question, was used by Mr. Mullins for his private business. In the same drawer were found other securities belonging to the bank, and this clearly shews that the custody was in the bank, which would be the proper custody; for Mr. Mullins, as an honest officer of and debtor to the bank, to whom he had given a security, would have dealt with that security exactly in the way in which I find he has dealt with it. All the deeds were tied up together, including the deeds claimed by the bank as additional security, and deposited by him in the drawer with other securities of the bank. It was said that the custody was entirely his, because he kept the key of the drawer. The key of a drawer containing securities belonging to the bank, he would keep as an officer of the bank. In the absence of any tittle of evidence to the contrary, I must presume that the conduct of Mr. Mullins was that of an honest debtor, who had given a security, and who had deposited that security in a drawer with other securities of the bank, he himself having the key of the drawer as an officer of the bank. I can therefore only attribute the custody of the deeds to the bank. It is said, there

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was no memorandum in writing to shew that those other instruments were included in the security of the bank. But the only important instrument was the policy of assurance tied up in the same bundle and under the same label with those, as to which there is no doubt, and it would be a strange confusion of law to insist upon the necessity of a memorandum in writing in a case of this kind, where there is no question as to real estate; and considering how far this Court has gone even as to real estate in the case of the deposit of deeds, to dispense with the operation of the Statute of Frauds. The policy of assurance was only a chattel interest, and therefore there is no degree of force in the argument that there must be evidence in writing. Here is a case where creditors had possession of the policy under circumstances which shewed how it came into their possession, and as a security for further advances; and I know of no principle that would authorise the Court to take an instrument like a policy of assurance from the hands of the creditors who held it under such circumstances, and enable the personal legal representative of the debtor to claim it as a part of his personal estate free from the lien. My opinion is, that the case of the petitioners is sufficiently made out upon the evidence, and I must make an order upon the footing that they are entitled to hold all the deeds and instruments in the bundle, as a security for the balance due to them from the testator.

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## HARRISON *v.* THE CORPORATION OF SOUTHAMPTON.

*July 5th & 25th.*

A testator having directed the corporation to erect a small building as a repository for his furniture, books, manuscripts, &c., and to appoint a person to take care of the same, and to renew the lease thereof when necessary, gave the residue of his personal estate to the corporation of Southampton, subject to certain legacies, in trust to employ the annual proceeds as may best promote the study and advancement of the sciences of natural history, astronomy, antiquities, and classical and oriental literature in Southampton, such as by forming a public library, botanic garden, observatory, and collection of objects in connection with the above sciences; such garden and library to be kept on his leasehold premises:—*Held* a valid bequest under the 8 & 9 Vict. c. 43 (*a*).

It is the duty of the Court, where it finds the Legislature intends to legalise the dedication of property to laudable public purposes, to construe the Act, so as to enlarge rather than limit its operation.

IN this case a question was raised as to the validity of the residuary bequest contained in the will of Henry Robinson Hartley. The will, which was dated the 30th of August, 1843, after giving certain legacies and annuities, proceeded as follows:—

"And as to the rest, residue, and remainder of my personal estate and effects, I give and bequeath the same and every part thereof unto the mayor and town councilmen of the town and county of the town of Southampton and their successors as a corporation in trust for the following uses:—First, that the said mayor and town councilmen shall cause a small building to be erected on part of my leasehold estate lying to the eastward of my houses in the parish of Holy Rood, in Southampton, to serve as a repository for my household furniture, books, MSS., and other moveables, and that they should appoint a person with a salary to have the care of the same; and that the said mayor and town councilmen shall keep my leasehold houses in the parish of Holy Rood, Southampton, in good repair, and renew the lease of them whenever the term for so doing shall arise; and after the expenses necessary for carrying the above specified purposes into effect are fully paid and provided for, to employ the dividends, interest, or annual proceeds arising from my said residuary estate, first, in making up to my said two servants,

(*a*) Repealed by the 13 & 14 Vict. c. 65, in which the substance of the former Act is re-enacted.

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*Statement.*

Elizabeth Compton and Harriet Young, so much of the said annuities of 30*l.* each as my said copyhold estate shall fail to realise and produce clear of legacy duty; secondly, in continuing the payment, in two equal half-yearly portions, of an annuity of 100*l.* for which I am engaged by bond to pay unto Mrs. Celia Ann Francis, of Portsea, Hants, for the term of her natural life, and not discharging the sum for which the said bond is given; and then to employ the remainder of the said interest, dividends, and annual proceeds, as they may think fit, in such manner as may best promote the study and advancement of the sciences of natural history, astronomy, antiquities, and classical and Oriental literature, in the town of Southampton, such as by forming a public library, botanic garden, observatory, and collection of objects in connection with the above sciences, such library, garden, and collection to be formed and kept, if such can be conveniently done, on my leasehold premises in the parish of Holy Rood, Southampton, aforesaid (that is to say) my late dwelling-house and the houses occupied by Mrs. Warren and Mr. Robert Derben, and the gardens behind the same."

The testator died in France, in May, 1850, and the bill was subsequently filed by the acting executor, to take the opinion of the Court as to the validity of the above gift. A question had been raised, and an inquiry directed, to ascertain the next of kin of the testator; it had been subsequently decided by a decree of the Lords Justices that Mrs. Roofe, a defendant, was the next of kin of the testator.

In 1849 the Corporation levied a rate to establish a museum, and in 1850, after the testator's death, formally accepted the bequest. The testator's property was of the value of 120,000*l.*, of which 90,000*l.* had been paid into Court.

*Argument.*

Mr. *Malins* and Mr. *G. M. Giffard* appeared for the plaintiff.

Mr. *Elmsly* and Mr. *Cole* for the defendants, Sarah Ann Roofe, the sole heiress and next of kin of the testator, and William Roofe, her husband.—This gift was void as within the Statutes of Mortmain, and was not excepted from their operation by the statute 8 & 9 Vict. c. 43, or by the 13 & 14 Vict. c. 65. It is impossible to read the Act without seeing that the testator meant something of a permanent nature to be established and carried out, by building either on his own property or on property to be bought under his will; at all events, the testator had not excluded the intention to purchase.

The testator was possessed of chattels real and of personalty. As to the chattels real, it was no doubt void; as to the personalty, the rule was, to see what the Court would have done if there had been no Statutes of Mortmain, and whether on the construction of the will the Court would have directed land to be bought: *Att.-Gen.* v. *Williams*(*a*), *Edwards* v. *Hall*(*b*). This charity was to have a garden, and there was to be a building to form a receptacle, the gift was therefore void: *Att.-Gen.* v. *Hodgson*(*c*), *Re Clancy*(*d*), *Att.-Gen.* v. *Davis*(*e*). In order to make this bequest good, it must be clear that land would not be purchased with this money: *Mather* v. *Scott*(*f*), *Giblett* v. *Hobson*(*g*), *Trye* v. *Corporation of Gloucester*(*h*), *Longstaff* v. *Rennison*(*i*).

Being void then under the Statutes of Mortmain, is this gift made good by the recent Acts? The statute 8 & 9 Vict. c. 43, enables corporations to accept lands for the purpose of a museum; but this is a gift of personalty merely, and that Act points at freeholds only. It is true, that the subsequent Act, 13 & 14 Vict. c. 65, includes lease-

(*a*) 2 Cox, 387.
(*b*) 17 Jur. 594.
(*c*) 15 Sim. 146.
(*d*) 16 Beav. 295.
(*e*) 9 Ves. 544.
(*f*) 2 Keen, 172.
(*g*) 3 My. & K. 517.
(*h*) 14 Beav. 173.
(*i*) 1 Drew. 28.

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holds, and sect. 9 makes valid bequests to all museums already begun, which was not the case here. The testator died in May, 1850; the corporation accepted the bequest in July, 1850; and they had previously made a rate for establishing a museum in 1849; but the Act 8 & 9 Vict. c. 43, was repealed in August, 1850.

*Argument.*

The *Solicitor-General*, Mr. *Bacon*, and Mr. *Shebbeare*, appeared for the corporation of Southampton, but were not heard.

Mr. *Wickens* appeared for the Attorney-General.

Mr. *Wigram*, Mr. *Craig*, Mr. *W. W. Cooper*, and Mr. *Marett*, appeared for other parties, but took no part in the argument.

*Judgment.*

The VICE-CHANCELLOR:—

The question is not as to the application of the provisions of the Mortmain Act, because the law at the time when the gift made by this will came into operation by the death of the testator, was regulated by the statute 8 & 9 Vict. c. 43, which was an Act for encouraging the establishment of museums in large towns—museums of art and science for the instruction and improvement of the inhabitants. By that Act the corporations of large towns within its operation were authorised to purchase land and to erect a museum upon that land. In the present case the testator gave the residue of his property to the corporation of the town and county of Southampton, and devotes it, as I read the will, entirely to purposes of science, for the benefit of the inhabitants of that town.

It has been contended, that the provisions of the statute 8th & 9th Vict. c. 43, do not apply to this will, because it is said that this testator contemplated purposes more ex-

tensive than the erection of a museum, and that the 8 & 9 Vict. only authorises the erection of museums. The purposes of the testator are stated, first, in very large and general terms, and so as not to direct the erection of a public building and museum at all; for his intention is stated clearly to have been to give the property to the corporation generally to promote the study and advancement of science; and where he mentions a library, garden, and collection, he only mentions them as by way of example or illustration, to shew what was in his mind as a proper mode for the advancement of science in that town: he says, "as by forming a public library, &c."

I am desired to construe this will in connection with the statute in such a way as to hold that a public library, botanic garden, and observatory are not within its provisions. It would seem to be the duty of the Court, where it finds that the legislature intended to legalise the dedication of property to laudable public purposes, to construe the Act rather as enlarging than limiting the provisions of the statute enacted for that purpose. No doubt, this Act of Parliament authorises corporations of towns, for such purposes, not only to purchase land, but thereon to erect buildings suitable for museums, and suitable for art or science, and to accept any gift, grant, or donation for these purposes. There is a clear authority to erect suitable buildings, and to employ land for the purpose of establishing, improving, or maintaining a museum; and, in the preamble it is stated, that they may do so for the instruction and improvement of the inhabitants of the borough.

If I were to hold, that, where it is clearly lawful to purchase land for the purposes contemplated by the Act, a garden, observatory, and library are to be excluded, I think I should come to a narrow and unjustifiable conclusion. This testator has only pointed to these particular things as examples of the way in which he wishes his property to be employed to promote study and the advancement of science. I admit, that

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*Judgment.*

this is a large construction of the Act; but I think it was intended that the words should have a liberal construction, and where the object is laudable and tends so much to the benefit of this borough, I do not feel myself authorised to say that the purpose may not be lawfully done within this Act. But it has been said, that this is a case of gift of personal property to be dedicated to these objects; and that, though the statute authorises a devise of lands, tenements, and hereditaments, it does not authorise a bequest of money to be laid out in land for those purposes. But when the words of the statute authorise the purchase of land, it is difficult to hold that a gift of money to be laid out in such a purchase is not within the statute. The Statute of Mortmain does not make every bequest of money to a corporation void, but annuls the gift where the money is to be laid out in the purchase of land. But here the statute says, it shall be lawful to lay out the money for that purpose; and my opinion is, that the money is left to the borough for purposes which are within this statute and lawful, and are not within the Statutes of Mortmain. The argument, as applied to that part of the will which relates to the library, garden, and observatory, I have already disposed of, as these terms are only used by way of example; but I must hold that the corporation are bound to look at the whole objects of the testator. These are only part of the modes in which his property is to be applied for the promotion of science, as stated in his will; for it is plain, that the endowment of lectures and many other modes of advancing science are open to this borough under this bequest; and nothing gives me greater satisfaction than to feel myself authorised to hold that this statute makes valid a bequest which is for a laudable purpose—the property being given to the corporation of this borough, who, I do not doubt, will apply it to proper purposes.

There remains the bequest as to the erection of a building upon the leasehold, which I cannot separate from the general bequest. I cannot hold anything invalid in the

direction to erect that building, where his books and manuscripts may be kept; and it is plain, that, where the books and manuscripts are to be kept, there must be some house and furniture; and there is nothing to shew that this bequest is not one which will be upheld by this Court (*a*).

(*a*) The following are the material sections of the Acts referred to in his Honour's judgment:—

8 & 9 Vict. c. 43, s. 1.—"Whereas it is expedient to promote the establishment and extension of museums of art and science in large towns, for the instruction and amusement of the inhabitants thereof: be it enacted, &c., that it shall be lawful for the council of any municipal borough, the population of which, according to the last account from time to time taken thereof by authority of Parliament, exceeds ten thousand persons, if such council shall think fit so to do, to purchase lands and to erect thereon buildings suitable for museums of art and science, and to maintain and keep the same in good repair, and to accept any gifts, grants, or devises of lands, tenements or hereditaments, for the purpose of establishing, improving or maintaining such museums, or to contribute toward the establishment and maintenance of such museums in any neighbouring borough; and that the costs and charges of such lands and buildings, and the keeping of the same in good repair, and the payment of any principal money or interest borrowed under the authority of this Act, or of such contribution, shall be chargeable upon and paid for out of the borough fund of such municipal borough, and for that purpose the council may levy with and as part of the borough rate, or by a separate rate to be levied in like manner as the borough rate, such sums of money as shall be from time to time needed, so that the whole amount of the borough rate be not increased in any one year for the purposes of this Act by more than one halfpenny in the pound, or if a separate rate be levied so that such rate do not in any one year amount to more than one halfpenny in the pound of the annual value of the property in the borough rateable to the borough rate.

Sect. 2. "And be it enacted, that, for the purchase of such lands, and for defraying the costs of such buildings as may be erected thereon, or for contributing to the cost of such purchase or building, it shall be lawful for the council of any such municipal borough as aforesaid, from time to time, with the approval of the Commissioners of Her Majesty's Treasury, to borrow at interest the amount of money which may be required for the same, on the security of the borough rates as aforesaid, or the separate rate authorised by this Act.

Sect. 3. "And be it enacted,

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that the lands and buildings so purchased or erected as aforesaid, and also all specimens of art or science, and articles of every description, which may be purchased for or presented to any such museum, and accepted by the council thereof, shall be vested in and held upon trust for ever by the mayor, aldermen, and burgesses of the borough in which such museum shall be situated, and shall be managed by the council of the borough, and kept in fit and proper order, for the benefit of the inhabitants of the borough and others resorting thereto."

13 & 14 Vict. c. 65, s. 1.—"Whereas it is expedient to promote the establishment and extension of public libraries, and to give greater facilities than now exist for establishing and extending public museums of art and science, in municipal boroughs, for the instruction and recreation of the people: be it enacted, &c., that an Act passed in a session of Parliament held in the eighth and ninth years of the reign of Her present Majesty, intituled An Act for encouraging the Establishment of Museums in large Towns, shall from and after the passing of this Act be repealed; and that it shall be lawful for the mayor, upon the request of the town council of any municipal borough (the population of which, according to the last account taken thereof by authority of Parliament, exceeds ten thousand persons), to ascertain whether the provisions of this Act shall be adopted for such borough, in manner following: that it is to say, by causing a notice to be affixed on or near the door of the town hall of the said borough, and on or near the door of every church or chapel within the said borough, and to be inserted in some newspaper published in such borough, or, if there be none such, in some newspaper published in the county in which such borough is situate, and circulating in such borough, specifying on what day, not earlier than ten days after the affixing and publication of such notices, and at what place or places within the said borough the burgesses are required to signify their votes for or against the adoption of this Act; which votes shall be received on such day, commencing at nine of the clock in the forenoon and ending at four of the clock in the afternoon of such day; and the said notice shall be to the effect of Form No. 1, in the schedule hereto annexed.

Sect. 4. "And it be enacted, that out of the monies to be raised under the provisions of this Act, it shall be lawful for the town council, or for such committees as they shall appoint for all or any such purposes, from time to time to purchase and provide such fuel, lighting, fixtures, furniture, and other similar matters, for the convenient and useful occupation and enjoyment of such libraries, museums, and premises, and to appoint such officers and servants, with salaries and remuneration, and to make such rules and regulations for the safety and use

of the said libraries and museums, and for the admission of visitors and others, as to them shall seem fit; and that any such committee may be appointed for such times only and composed of such persons (whether members of the council or not) as the council may think fit, and may at any time be dissolved by the said council.

Sect. 5. "And be it enacted, that, for the purchase of such lands, and the erecting, extending, altering, and repairing of such buildings, it shall be lawful for the council of any such municipal borough as aforesaid, from time to time, with the approval of the commissioners of Her Majesty's Treasury, to borrow at interest such sums of money as may be required for the same, on the security of the said yearly amount of borough rate authorised by this Act.

Sect. 6. "And be it enacted, that the lands and buildings so purchased, erected, extended, or altered as aforesaid, and also all books, maps, and specimens of art and science which may be presented to, and all fixtures, furniture, and articles of every description which may be presented to or purchased for, any such library or museum, or to or for the said council for the purposes of such library or museum, or to or for any committee appointed by them, shall be vested in and held upon trust for ever by the mayor, aldermen, and burgesses of the borough in which such library or museum shall be situated, and shall be managed by the council of the borough (or by a committee or committees appointed by them) and kept in fit and proper order, for the benefit of the inhabitants of the borough and others resorting thereto.

Sect. 8. "And be it enacted, that, if the burgesses shall determine in the manner aforesaid against the adoption of this Act, it shall not be lawful within two years after such determination again to take the votes of the burgesses of the said borough in manner aforesaid for the purpose of ascertaining whether the provisions of this Act shall be adopted for such borough.

Sect. 9. "And be it enacted, that, notwithstanding the repeal of the said Act hereby repealed, all museums established or begun under the provisions of the said repealed Act may be lawfully maintained, completed, and managed by the ways and means in this Act provided, in all respects as if such museums had been established and begun under the sanction and provisions of this Act.

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*July 4th.*

## WISDEN *v.* WISDEN.

A testator, after directing that all his just debts should be paid by his executors, devised to his eldest son certain houses, subject, nevertheless, to his paying off the mortgage thereon; and then, having devised to his other sons other houses which he had incumbered, and to his daughters certain houses which were free from incumbrance, empowered his executors to receive all rents due to his estate, and to pay his debts, and to use such means as should be necessary for recovering all money due to his estate, and also to grant possession to his devisees, and to reimburse themselves:—

SIMON WISDEN, late of Brighthelmstone, in the county of Sussex, gentleman, deceased, duly made and executed his last will and testament in writing, dated the 27th day of June, 1840, as follows:—

"First, I order and direct that all my just debts be paid and satisfied by my executors hereinafter nominated and appointed. I give, devise, and bequeath unto my son, Joseph Wisden, all my three dwelling-houses, situate and being Nos. 41, 42, and 43, in Grenville-place, Brighton, aforesaid, subject nevertheless to his my said son Joseph's paying off the mortgage of 750*l.*, which said sum being advanced on the said premises by and for his use and benefit and enjoyed by him. I give, devise, and bequeath unto my son Thomas Wisden my two dwelling-houses, situate and being in Russell-street; and also my two dwelling-houses situate and being Nos. 1 and 2 in the Farm-yard, in Brighton, with the use of the privies therein and appurtenant thereto. I give, devise, and bequeath unto my son Edward Wisden my two dwelling-houses, situate and being, numbered 19 and 20, in Russell-street, with the use of the yard, &c. there and the appurtenances. I give, devise, and bequeath unto my son William Wisden all those my three dwelling-houses situate and being, numbered 81, 82, and 83, in North-street, Brighton, with their appurtenant. I give, devise, and bequeath unto my son George Wisden all that my dwelling-house, being numbered 80

*Held*, not a general charge of debts on the whole of the real estate.

Devise by the testator to his eldest son, who had died previously to the date of the will leaving an heir: *Held*, on the construction of the 33rd section of the Wills Act, that the heir of the devisee was entitled.

Devise by the testator to his three daughters of real estate, with the appurtenances, to hold the same in joint tenancy for their own sole use and benefit in succession, and not subject to the debts or control of their husbands; the same not to be sold or disposed of, but held in succession by his three daughters, with right of survivorship:—*Held*, that the daughters took as joint tenants in fee.

and situate in North-street, Brighton, together also with the Herring Dees there, and all the appurtenances thereto belonging. I give, devise, and bequeath unto my son John Wisden all those my three houses situate and being, numbered 47, 48, and 49, in Grenville-place, together also with my butcher's shop and dwelling-house situate in Russell-street: To hold the said messuages or dwelling-houses unto my said sons, their heirs and assigns, for ever. But, nevertheless, I order and direct, that neither of my said sons shall have or take possession of any or either of the said premises until the time that all my just debts shall be paid and satisfied. I give, devise, and bequeath unto my daughter Ann, the wife of Calib Hornby, and Mary, the wife of Walter Tucker, and Johanna Wisden, all that my house in King's-road, being numbered 106, together with all that my property situate in Cannon-place, which I now hold, with the appurtenances: To hold the said last-mentioned premises unto my said three daughters, in joint tenancy, for their own sole use and benefit in succession, and not subject to the debts, control, or management of any husband which they or either of them may have. And I order and direct that the same or any part of the same premises shall not be sold or in any manner be disposed of, but held in succession by my said three daughters; and so that if any one or more of my said three daughters shall depart this life, the survivors or the survivor shall be entitled to and take such deceased sister's part or share in the said premises; and I devise the same accordingly. I give, devise, and bequeath unto my grand-daughter Maria Mighell, the daughter of William and Maria Mighell, all that my dwelling house and premises situate and being No. 79 in North-street, Brighton: To hold the same to my said grand-daughter, her heirs and assigns, for ever. But in case my said grand-daughter should die in her minority leaving no lawful issue, the premises so devised to her shall go to my other said three daughters as joint tenants, and I

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devise and direct the same accordingly. I give, devise, and bequeath unto my daughter Johanna Wisden all that my dwelling-house and premises situate and being No. 4 in Grenville-place, together with the furniture therein contained: To hold the same to my said daughter Johanna, her heirs and assigns, for ever. And I hereby make, ordain, nominate, constitute, and appoint my son-in-law Calib Hornby and William Wisden joint and sole executors of this my will; and do hereby authorise and empower them to receive all rents due to my estate, and to pay all my just debts, and to use such means as shall be necessary for recovering all money due to my estate, and also to grant possession to my devisees as hereinbefore is directed, and also to reimburse unto themselves all reasonable expenses that they may be put unto in the execution of the trust hereby in them reposed."

The testator died on the 12th of December, 1842, and Caleb Hornby having died previously, the will was proved on the 2nd of February, 1843, by William Wisden, the surviving executor.

Joseph Wisden died on the 3rd of April, 1839, (in the lifetime of the testator), in America, leaving Simon Wisden, his only son, his heir-at-law, and also the heir-at-law of the testator.

The houses devised to Joseph Wisden were subject to a mortgage for 750*l.*

The houses devised to Thomas, William, and George Wisden and Maria Mighell were, at the death of the testator, subject to a mortgage created by him for 2000*l.*

The houses and hereditaments devised to Edward and John Wisden were, at the death of the testator, subject to a mortgage for 700*l.*

The house, No. 4, Grenville-place, devised by the testator to his daughter Johanna, was subject to a mortgage for 700*l.*; but with that exception, the houses devised by the

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testator to his three daughters Ann Hornby, Mary Tucker, and Johanna Wisden were unincumbered.

*Statement.*

On the 21st of March, 1841, William Wisden died, having by his will devised the houses, 81, 82, and 83, North-street, Brighton, and all other his real estate, on trust for sale, and to apply the proceeds in satisfaction of the mortgages, and in the meantime to keep down the interest, with an ultimate trust for his children.

The bill was filed by the infant children of William Wisden, in order to have the trusts of the will of Simon Wisden, the testator in the cause, established by a decree of the Court.

The mortgage debts amounted to 3450*l.*, and other debts to 25*l.* 13*s.* The personal estate had been found to be insufficient to pay the debts.

The first question raised was, whether the words of the will created a general charge of debts on the real estate. Secondly, whether, under the 33rd section of the Wills Act, 1 Vict. c. 26, the son of Joseph took by descent. Thirdly, whether the devise to the daughters was for life or in fee.

*Argument.*

Mr. *Craig* and Mr. *Shebbeare* for the plaintiffs.—The first direction in the will was, that all the testator's just debts should be paid, without specifying the source from which payment should be made. If therefore these words amounted to a charge of debts, it must be a general charge on his property, real and personal. Unless, then, there is something in the will to shew that particular parts of the estate were not intended to be charged, all the real estate must contribute rateably.

Here one of the devisees was also the executor, a circumstance which Sir *William Grant*, in the case of *Powell* v. *Robins* (*a*), referring to *Finch* v. *Hattersley*, thought was not immaterial. In *Price* v. *North* (*b*) the words were: "First, I will that all my just debts, funeral expenses, and the costs and charges of proving this my will, be fully

(*a*) 7 Ves. 210. (*b*) 1 Ph. 85.

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paid and satisfied;" and it was held, that these words amounted to a legal charge of debts on the real estate. In that case, the Lord Chancellor observed (*a*) that Courts of Equity were always desirous of sustaining such charge for the benefit of creditors, and the presumption in favour of them was not to be repelled by anything short of clear and manifest evidence of a contrary intention. In *Clifford* v. *Lewis* (*b*), the words "I will and direct my just debts and funeral and testamentary expenses to be paid and satisfied," in the introductory part of the will, were held to amount to a charge of the debts on the real estate. The same principle was acted on in the case of *Ball* v. *Harris* (*c*).—*Robinson* v. *Lowater* (*d*), *Trott* v. *Vernon* (*e*), Ram on Assets, 2nd edit., p. 437; Jarman on Wills, vol. 2, pp. 554, 555, were also cited on this point.

If the will created a charge on the real estate, it was quite clear that all the devisees must contribute to the exoneration of the estate: *Carter* v. *Barnardiston* (*f*).

But, as to the devise to Joseph, who was dead at the date of the will, it was quite clear, that, unless it was preserved by the 33rd section of the recent Wills Act (*g*), the devise had failed; but the object of the Wills Act was to prevent a devise made in the lifetime of the devisee from failing by reason of his death before the death of the testator. It never was the intention to give effect to a devise made to a person then not in existence.

(*a*) 1 Ph. 87.
(*b*) 6 Madd. 33.
(*c*) 8 Sim. 484; 4 My. & Cr. 264.
(*d*) 18 Jur. 321.
(*e*) Prec. in Chanc. 430.
(*f*) 1 P. Wms. 505.
(*g*) 7 Will. 4 & 1 Vict. c. 26, s. 33. By which it is enacted, "That where any person, being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

If this view of the statute be correct, it followed that the devise to Joseph failed, and descended to the testator's heir-at-law, and was, therefore, assets primarily applicable in exoneration of the devised estate. At all events, if the Court should hold that the heir of Joseph took under the operation of the Wills Act, the equity of redemption that passed to him was equally liable with the other devised estates to contribute pro ratâ.

Mr. *Bacon* and Mr. *Jolliffe* for Simon Wisden, the heir of Joseph.—The estate devised to Joseph was intended to be charged generally with debts, inasmuch as the testator had made it expressly subject to his paying off the mortgage charged upon it; and therefore, upon the principle that expressio unius est exclusio alterius, it was subject to no other burden.

It has been laid down by Vice-Chancellor *Turner* in the case of *Winter* v. *Winter*(*a*), that the sound construction of the Wills Act was, that, if the bequest was made after the Act came into operation, the Act would apply to a case where a child might have died before the will was made, but after the will came into operation. In the case of *Mower* v. *Orr*(*b*) the same learned Judge held, that where the son of the testator died after the Wills Act, but before the date of the will, the gift took effect.—*Wild* v. *Reynolds*(*c*), and *Cole* v. *Scott*(*d*), were also cited.

Mr. *Elmsly* and Mr. *Goldsmid* for the other devisees in the same interest.—All the rents and profits given to the executors must be first applied: *Henvell* v. *Whitaker*(*e*). Here, it was the obvious intention, that the whole of the debts should be paid generally out of the property. The words were perfectly plain, and, coupled with the concluding paragraph, made it the imperative duty of the ex-

(*a*) 5 Hare, 314.
(*b*) 7 Hare, 473.
(*c*) Notes of Cases in the Eccles. and Mar. Courts, Vol. 5, p. 1.
(*d*) 1 Mac. & G. 518.
(*e*) 3 Russ. 343.

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ecutors to discharge the debts, and one which this Court would not allow them to neglect.

*Argument.*

Mr. *Walker* and Mr. *G. Simpson* for the testator's grand-daughter, contended, that the gift to the three daughters of the testator was only for life.—They cited *Blann* v. *Bell*(*a*).

Mr. *Malins* and Mr. *Pigott* appeared for the daughters.

Mr. *Grenside* for other parties.

*Judgment.*

The VICE-CHANCELLOR:—

The first question is as to there being a general charge of debts upon all the real estate devised by the testator Simon Wisden. Taking the whole of the will together, I can see nothing to charge the whole of the real estates; but I see very peculiar language which goes to charge the particular estates devised to the sons, language which strengthens the impression upon my mind, that there was no intention on the part of the testator to create a general charge of debts upon all his real estate.

The first words do not create a general charge. They are merely a direction that the debts are to be paid and satisfied by the executors; and immediately following that direction, the testator devises houses to one son subject to his paying off the mortgage debt affecting them. The words which create the real difficulty as to the charge of debts are to be found at the end of the will; and it is remarkable, that the executors, whom the testator directed to pay the debts, are described as the persons who are to take certain funds for that purpose, and those funds are personal estate. The testator gave the executors authority to receive the rents and profits which should be due to his estate at his death (which would be personalty), and to pay all his just

(*a*) 5 De G. & S. 658.

debts, and to use such means as should be necessary for recovering all monies due to him. That would seem to shew that the executors were to receive the personal estate, and in the first place thereout to pay his debts.

The words which create the difficulty are those which say that the executors "were to use such means as should be necessary for recovering all money due to his estate, and also to grant possession to his devisees as was hereinbefore directed." These words countenance the argument, that the executors were to take something out of the real estate, for they were to grant possession to the devisees; and that, by implication, seems to make the debts a charge upon the real estate, to which that direction as to possession applies. The previous words in the will explain what the testator meant, for he ordered "that neither of his said sons should have or take possession of any of the premises until the time that all his just debts should be paid and satisfied." Now, coupling the words at the end of the will as to possession, with those words which direct possession to be given by the executors, I think all is made intelligible, and that the testator meant that all his property which he had devised to his sons should be charged with the payment of all his debts. As to the devise to the daughters, there are no words which direct when possession was to be given; therefore, that direction, being inapplicable to them, can have no effect as creating a charge on the estates devised to the daughter. I am, therefore, of opinion, that the testator intended those estates should not bear any part of the debts or mortgages.

My opinion is, that the debts are charged upon the estates devised to the sons; and I think the state of the assets shews that this was not an inconvenient mode of dealing with the real estate with reference to the charge of debts; for as I understand the result of the accounts is, that all the debts are found to be provided for except the mortgage debts,—as to which, I am of opinion that the first gift is subject only to the mortgage affecting it. I

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*Judgment.*

read the whole of the will together, and the effect of the words is, that the same principle was to be followed out with reference to the gifts to the other sons; but there is a difficulty in doing that, inasmuch as one of the mortgages (that for 2000*l.*) affects not only the estate devised to one son, but the property given to two or more; and the same observations apply to the mortgage for 700*l.* The result of there being a charge of these mortgages only upon the real estate devised to the sons will be, that, as between the devisees of the estates subject to one mortgage, there must be a rateable contribution according to the value of the property devised. That disposes of the whole question as to the payment of the mortgage debts, and the exoneration of the daughter's property.

Then comes the question as to the gift to Joseph Wisden, who, when the testator made his will, was dead—whether, upon the construction of the 33rd section of the Wills Act, there being no such person as Joseph in existence at the time when the will was written, that clause, which says that lapsed devises in the case of a child shall not be affected by such lapse, shall be read as if the child had not died until after the will was written. It is said, however, that this cannot apply to the case in which no such person was in existence at the date of the will as a son to whom the property was devised. The words of the Act of Parliament are very comprehensive, and seem to include a devise to any child who shall die at any period in the testator's lifetime. The words are, "that where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed, for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall ap-

pear by the will." These words point at no particular period of death within the testator's lifetime. The words "shall die" speak from the death of the testator; and I can see no words to refer the futurity of the word "shall" to the date of the will. I consider the words of the clause as meaning that any gift to any child, though not living at the testator's death, is within its operation; and therefore I must construe the will as if the deceased child was alive when the will was written; and I shall hold, that the son of Joseph takes the devised estate by descent from his father, the devisee, under the will.

I have next to consider, whether, there being no words of inheritance in the gift to the daughters of the testator, the estate given to them is for life or in fee.

The case cited has, I think, nothing to do with this case. I must interpret the language of this will by the aid of the Wills Act, and, according to that Act, without words of inheritance, a fee simple will pass, unless a contrary intention appear by the will. It is said, however, that a contrary intention does appear here, because in other parts of the will words of inheritance have been used. My opinion is, that the daughters take as joint tenants in fee.

But it is difficult to treat the case of words of inheritance used as to other estates and other persons, as manifesting a sufficient intention within the meaning of the Act, contrary to that which the Act says shall be the general interpretation as to every devise with reference to which a contrary intention does not appear on the will.

With regard to the only remaining question, I think the express charge on Joseph's estate of the mortgage affecting it, prevents it from being liable to contribute to the other mortgage debts. The testator seems to have intended him to take the whole benefit of that devise after paying off the mortgage.

The following order was then made:—

Declare, that the three dwelling-houses, Nos. 41, 42, and

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43, Grenville-place, Brighton, devised by the will of the testator to his son Joseph, are liable to pay and discharge the mortgage debt of 750*l.* in the will and Master's report mentioned, in exoneration of the other real and personal property of the testator. Declare, that the equity of redemption in the said three dwelling-houses, in the event that has happened, passed under the will of the said testator to the defendant Simon Wisden, the only son and heir-at-law of the said Joseph. Declare, that the fee simple and other the whole estate and interest of the said testator in his house No. 106, King's-road, Brighton, and his property in Cannon-place, Brighton, was effectually devised to his three daughters, Ann, Mary, and Johanna, and the survivors and survivor of them. Declare, that the testator's granddaughter Maria Mighell is entitled to the dwelling-house and premises No. 7, North-street, Brighton, exonerated from any part of the 2000*l.* mortgage debt. Declare, that the several houses, hereditaments, and premises devised by the will to the testator's sons Thomas, Edward, William, George, and John, as between the devisees of the testator's estate, are primarily liable to pay and discharge the two several mortgage debts of 2000*l.* and 700*l.* and the simple contract debt of 25*l.* 13*s.* 0*d.*, in proportion to the respective values of the said estates, in exoneration of the said testator's other real property specifically devised and of his personal property specifically bequeathed. Ordered, that the real estates devised to Thomas, Edward, William, George, and John, be sold free from the mortgages of such mortgagees as shall consent thereto, and subject to the mortgages of such mortgagees as shall not consent. Ordered, that the purchase monies shall be paid into the Bank with the privity of the Accountant-General; the purchase money of each lot to be carried to such account as shall be by the Chief Clerk directed. As to such mortgagees as shall not consent, Ordered, that an account be taken of what is due for principal, interest, and costs, in respect of their mortgages, and without prejudice to the declarations

hereinbefore contained as to the primary liability as between the said devisees to the same mortgage debts. Ordered, that the amount certified to be due to the mortgagees on taking the account be paid out of the purchase monies of the said lots comprised in their respective securities. Ordered, that the further consideration of this case be adjourned, with liberty to apply.

## POWDRELL *v.* JONES.

*July* 31*st &*
*Nov.* 11*th.*

Copyholds surrendered to a purchaser to uses similar to the common uses to bar dower, on which surrender the purchaser was admitted to hold as tenant in fee simple, and continued to hold on that admittance till his death; his devisee is bound by the terms of the admittance, and not entitled to claim as appointee under the surrender, so as to defeat the widow's right to free bench.

THIS was the petition of Martha Elizabeth Harper, praying that the sum of 16*l.* 16*s.* 7*d.*, now in Court, might be paid to her, being the dividends of a sum of 500*l.* paid into Court, as the purchase money of the copyhold estate, called Mossfields, in the will mentioned, and that the same might be invested.

The petition stated, that, on the 10th of August, 1843, the petitioner became the second wife of George Harper. On the 28th of February, 1851, George Harper purchased from John Faulkener Wood, the customary fee simple of copyhold land held of the manor of Doddington, in the parish of Whitchurch, in the county of Salop, and thereupon, at a Court held for the said manor on the 28th of February, 1851, the said John Faulkner Wood and Charlotte Elizabeth, his wife, who was separately examined and consented, in consideration of 120*l.*, did by the rod, according to

*Quære,*—Whether, since the statute 55 Geo. 3, c. 192, the devisee of copyhold estates surrendered to the uses of the will can claim as appointee under the surrender.

The Statute of Dower 3 & 4 Will. 4, c. 105, does not extend to copyholds.

Copyhold land, purchased by the husband, was surrendered to the use of him and his assigns for life, and, after his decease, to the use of such person, for such estate, and upon such trust as he by any surrender or by will should surrender or devise, and in default of such surrender or devise, and so far as the same, if incomplete, shall not extend, to the use of the husband, his heirs, and assigns for ever, at the will of the lord, &c. The husband was admitted in fee, and by will devised the land to a trustee on trust for sale. By the custom of the manor, the title of the wife could only be destroyed by her voluntary surrender:—*Held,* that she was entitled to her customary dower.

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*Statement.*

the custom of the manor, surrender into the hands of the lord of the manor, by their steward, the land then occupied by George Harper, called Mossfields, part of land belonging to the said John Faulkener Wood, of the manor of Doddington, and also of all the ways, waters, &c., &c., &c. thereto belonging, and all the reversion, remainder, rents, profits, use, trust, inheritance, &c., claim and demand of the said J. F. Wood and Charlotte Elizabeth, his wife, in, to, or out of the same piece of land, and every part thereof, "To the use of the said George Harper and his assigns during his natural life, without impeachment of waste, and after his decease to the use of such person or persons, for such estate or estates, and upon and for such trust, intents, and purposes, and with, under, and subject to such powers, provisoes, limitations, and restrictions, as the said George Harper, by any surrender or surrenders, or by his last will and testament in writing or any codicil thereto, or any writing purporting to be in the nature of his will or of a codicil thereto, should surrender, give, devise, or dispose of the same; and in default of such surrender, gift, devise, or disposition, and so far as the same, if incomplete, should not extend, to the use of the said George Harper, his heirs and assigns for ever, at the will of the lord, according to the custom of the said manor, by and under the rents, hereditaments, and services therefor due and of right accustomed; and the said George Harper being present there in Court, in his own proper person, prayed to be admitted tenant to the lord of the said manor, to the said piece or parcel of land so surrendered, with the appurtenances; to whom the lords of the said manor, by their steward, granted the same and delivered seisin thereof by the rod, according to the custom of the said manor, to have and to hold the said piece or parcel of land, with the appurtenances, unto the said George Harper, his heirs and assigns for ever, at the will of the lord, according to the custom of the said manor, by and under the rents, hereditaments, and services to the

said lord of the said manor due and of right accustomed; and for such his estate and admittance the said George Harper gave to the lord, for a fine, 1*s.* 3*d.*, and did his fealty, and was admitted accordingly."

It appeared from the affidavit of the steward that by the immemorial custom of the manor of Doddington, the first wife of a copyholder was entitled, for her life, to her free bench or customary dower, from the death of her husband, of the whole of the copyhold land of which her husband was at any time seised for an estate of inheritance. The second wife was entitled to the same interest durante viduitate. According to the custom of the manor, the wife's title could not be barred or destroyed by the surrender or other act of her husband, but only by her voluntary surrender made during her marriage after her examination and consent, taken apart by the steward.

George Harper erected certain buildings on the land, and died on the 26th of September, 1851, seised of the said land, having duly made his will, by which he devised the said land to Richard Parry Jones on trust for sale.

On the 4th of November, 1853, Richard Parry Jones contracted to sell the said land for 500*l.* to Robert Burton and the Rev. John Dryden Piggott, and by an order of the Court, made in the cause, in December, 1853, the contract was confirmed. In February, 1854, the purchaser paid into Court the purchase money and interest to the credit of "the Mossfield purchase."

In March, 1854, the petitioner was applied to by the trustee to surrender the premises, in order to bar her dower, and to make a good title and effectual conveyance; which she consented to do and did, upon the understanding that she should have the same interest in the purchase money, in respect of her customary dower, which she had in the land.

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*Argument.*

Mr. *Malins* and Mr. *Kenyon* for the petition.—By the custom of the manor, the wife was entitled to her customary dower of all lands held of the manor in which her husband had an estate of inheritance. Here the surrender was to the husband substantially in fee. He was also admitted in fee. It was true, that in the surrender the terms were to him as he should devise, &c. &c.; but this was mere surplusage, and conferred no interest that would not have passed under a simple surrender in fee. Under the 27th section of the Wills Act, 1 Vict. c. 26, a general devise would not operate as an appointment where it could operate as a general devise; though, in cases where there was a power only, a general devise would no doubt operate as an appointment under the power. It was clear that Harper was admitted to the whole customary fee simple, and it was impossible, therefore, to contend that his will operated as a power. His widow, therefore, would be entitled to her customary dower by a title paramount to the will, unless her right was defeated by the custom of the manor, or by the recent Dower Act, 3 & 4 Will. 4, c. 105.

It was quite clear, however, from the evidence, that the custom of the manor was in favour of the widow's right; and it was equally clear that the Dower Act did not apply to the case of copyhold land (*a*).

Mr. *Wigram* and Mr. *Charles Hall* contra.—The admittance to copyhold lands shall have relation to the surrender: *Benson* v. *Scott* (*b*): and, therefore, as the surrender was to such uses as he should by deed or will appoint, his will must be taken to be an appointment, and therefore the widow's right to dower never attached.

The surrender was the substantial part of the conveyance, and a complete execution of the contract between the vendor and vendee. The surrender and the admittance were

(*a*) Post, p. 408, n. (*b*) 4 Mod. 252.

different parts of the same conveyance. "The *formal* effectuates the *substantial* part, and, therefore, must relate to it." Both together make but one conveyance: *Vaughan* v. *Atkins* (*a*). Admittance to a copyhold enures according to the title, even though incorrectly expressed: *Church* v. *Mundy* (*b*). Thus, where a copyholder in fee surrendered to the uses of a prior settlement, which contained a power to revoke the uses therein declared and limit new ones, it was held that uses limited in execution of the power were good, although they had the effect of defeating prior vested estates: *Boddington* v. *Abernethy* (*c*), *Hall* v. *Hill* (*d*), Watkins on Copyholds, vol. 2, p. 69, 4th ed.; Scriven on Copyholds, p. 72; *Kensington* v. *Mansell* (*e*), Sugden on Powers, vol. 1, p. 451, and *Lord Chedworth* v. *Edwards* (*f*), were also cited.

But, assuming that Harper's will was a general devise, and not an appointment under the power reserved to him in the surrender, it was nevertheless sufficient to defeat his widow's right to dower. The 4th section of the Act (*g*) enacted, that no widow should be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will.

Mr. *Bacon* and Mr. *H. Humphreys* and Mr. *Druce* appeared for other parties (*h*).

(*a*) 5 Burr. 2786.
(*b*) 12 Ves. 326.
(*c*) 5 B. & C. 776.
(*d*) 1 Dru. & War. 94.
(*e*) 13 Ves. 250.
(*f*) 8 Ves. 46.
(*g*) 3 & 4 Will. 4, c. 105.
(*h*) The following remarks are contained in the First Report of the Real Property Commissioners, pp. 16 and 19:—

"We do not propose at present to extend the alteration of the law of dower to gavelkind lands, or borough English lands, or to copyhold or customary lands; as to all which the right to dower or free bench is regulated by a variety of peculiar customs. We deem it expedient to postpone the recommendation of any further alteration of the laws relating to those several tenures until the whole subject shall come under our view."

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*Nov.* 11*th*. *Judgment.*

The VICE-CHANCELLOR :—

Mrs. Harper, by her petition, claims to be entitled to her free bench, according to the custom of the manor of Doddington, of the piece of land, copyhold of that manor, purchased by her husband, the testator, George Harper, in the year 1851. He was admitted to hold as tenant in fee simple, according to the custom of the manor, and he continued tenant on that admittance at his death. The custom of the manor is satisfactorily proved to be, that the wife of a copyholder is entitled to have for her free bench or customary dower, from and after the decease of her husband, the whole of the copyhold lands holden of that manor of which the husband was at any time during the marriage seised for an estate of inheritance. If she was the first wife, she was, according to the custom, entitled for the whole term of her natural life ; but if the second wife, then for the term of her widowhood only ; and this title of the wife cannot, according to the custom of the manor, be barred or destroyed by the surrender or other act of her husband, or otherwise than by a voluntary surrender made by the wife, and if made during the marriage, then after she shall have been first examined by the steward of the manor apart from her husband, and shall have freely consented thereto.

The devisee in trust of Harper, the husband, denies the right of Mrs. Harper to free bench, insisting that she is barred by the terms of the surrender to Harper. That surrender was to the following uses :—" To the use of George Harper and his assigns, during his natural life, without impeachment of waste ; and after his decease to the use of such person or persons, for such estate or estates, and upon and for such trusts, &c., as the said George Harper, by any surrender or surrenders, or by his last will and testament in writing, or any codicil thereto, or any writing purporting to be or in the nature of his will or of a codicil thereto, shall surrender, give, devise, or dispose of the same ;

and in default of such surrender, gift, devise, or disposition, and so far as the same, if incomplete, shall not extend, to the use of the said George Harper, his heirs and assigns for ever, at the will of the lord, according to the custom of the manor."

It was argued, on behalf of the devisee, that, the surrender being the governing instrument in the title of Harper, his will operated as an appointment of the uses under the surrender, and that the devisee is in by title paramount under the surrender, so as to defeat the widow's right to free bench.

But the terms of the surrender, which is properly said to be the governing instrument, justified the admittance of the testator Harper to the entire customary fee. The words of the surrender are only an amplified description of the estate and rights of a tenant in fee simple. Lord Coke, in his "Complete Copyholder," p. 82, says the surrender is a thing executory, and the intent of the grantor much favoured; and he also says, that the admittance is the perfection of the surrender. The intent of the surrenderor in this case, he being the vendor to Harper, was undoubtedly to make such a surrender as should place the whole fee simple in Harper, and at his disposal.

It is, therefore, difficult to see any just reason for saying that Harper's admittance on his own prayer to the lord, being an admittance to the entire customary fee simple, was not a proper admittance; and still more difficult to see how any one claiming under Harper can object to such an admittance on such a surrender.

No doubt it is now settled that a power of appointment may co-exist with the fee simple in the same person. But that co-existence is only admitted for extraordinary purposes, and by the subtle application of an operation of the Statute of Uses. Where the question is as to land of copyhold tenure, where the tenancy is filled by an admittance to the whole customary fee simple (the admittance being

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*Judgment.*

justified by the terms of the surrender), those words in the surrender which say that it was to the uses of Harper's will become as nugatory and inconsistent with the notion of his will being an appointment under a power, as the other words, which say the surrender was to the uses of any surrender which Harper might make, are inconsistent with the notion that a surrender by Harper would operate as an appointment under a supposed power in the surrender to him by the vendor. That Harper's will can be treated as an appointment under a supposed power in the surrender to him, is not merely negatived by his admittance to the entire customary fee simple. Since the stat. 55 Geo. 3, which gives a statutory effect to the disposal of copyholds by will without any previous surrender to the uses of the will, the argument which treats a will of copyholds as the execution of a general testamentary power of appointment certainly seems to me not maintainable in this case, or, perhaps, in any other. The effect of that statute in this case seems to make those words of the surrender which say that it is to the uses of Harper's will nugatory and superfluous words.

It was, however, argued, that the surrender, being the governing instrument, the admittance of Harper to the absolute fee simple could not alter the uses of the surrender; and that, according to the authorities, any variation between the admittance and the surrender might bind the lord, but could not bind any other person. If it be contended that the tenant admitted according to the terms of his own prayer, and his devisee claiming as a volunteer under his will and bound by his act, are not both bound by the terms of that admittance, that seems to me a mistake.

What might have been the effect on the widow's claim to free bench, if, before Harper's admittance to the entire fee simple, he had made a will, and admittance on the surrender to Harper had been claimed by his devisee, is not now a question; and if such a question should ever occur,

it may occasion a discussion of some interest on various points, and, among others, on the effect of the stat. 55 Geo. 3, c. 192, as applied to such a case. It was urged, that the surrender, as made after the life estate to Harper to the uses of his will, shews that the intention was to bar the right to free bench, by taking it in the form which would bar dower, if the limitations had been in a conveyance of freeholds operating under the Statute of Uses. But the form of the admittance on Harper's own prayer to the customary fee simple, shews clearly enough that Harper himself had no such intention.

This, therefore, is a case in which the husband having been seised of the fee simple and inheritance of this copyhold during the coverture, the widow is, I think, entitled to her free bench according to the custom of the manor, as proved by the evidence.

It is scarcely necessary to advert to the question whether copyholds are not within the Statute of Dower, 3 & 4 Will. 4, c. 105. The language of the statute itself shews that it refers only to estates which pass by deed and not by surrender, and the opinion of Lord *St. Leonards* is repeatedly expressed, that copyholds are not within that statute.

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*July* 21*st.*

## RE LORD SONDES' WILL.
## RE HON. H. WATSON'S WILL.
## RE THE TRUSTEE ACT.

Where there is a valid appointment to an object of the power, with additional words of appointment in favour of the appointee's children, by which in excess of the power those children are also made appointees, so as to cut down the previous absolute interest :—*Held*, that the words in excess of the power are to be altogether rejected, and that the appointee, who is an object of the power, takes absolutely.

THIS was the petition of Grace Trollope and Charlotte Palmer, praying that one moiety of the sums of 3061*l.* 7*s.* 7½*d.*, and of 4800*l.* Stock, after payment of costs, might be paid to the petitioners.

Lord Sondes, by his will, dated the 24th of February, 1830, bequeathed to his brothers, John Lord Sondes and the Hon. Henry Richard Watson, the sum of 15,000*l.* upon trust, to invest the same in Stock, "for the benefit of his sister, Dame Mary Grace Palmer, for her life, and, after her decease, upon trust, to assign, transfer, and pay the said stocks, funds, or securities, unto such one or more of the children of the said Dame Mary Palmer, other than and except her eldest or only son for the time being, and in such parts, shares, and proportions, manner and form, as she, notwithstanding any coverture, and whether sole or covert, by any deed or deeds to be by her executed in the presence of and to be attested by two or more credible witnesses, should direct, limit, or appoint; and in default thereof to assign, transfer, and pay the same unto, between, and among all and every the children of the said Dame M. G. Palmer, other than and besides her eldest or only son for the time being, who being a son or sons should attain that age, or being daughters should attain that age, or marry, with the consent of guardians," &c., with a gift over in the event of Dame M. G. Palmer having no children.

Lewis Richard Lord Sondes died in March, 1836, and, after his death, the legacy duty was paid on the sum of 15,000*l.*, by which the amount of the bequest was reduced to 14,542*l.* 8*s.* 2*d.*

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The Hon. Henry Watson, by his will, dated the 14th of February, 1832, bequeathed the sum of 15,000*l.* Consols, 3½ Bank Annuities, to John Lord Sondes and the Hon. Mr. Watson, upon trust, to raise and pay thereout the sum of 1500*l.*, and to pay the same to his executors as part of his residuary personal estate; and the said testator directed that his trustees should stand possessed of and in such sums of Stock, subject to such sale and deduction thereout as aforesaid, upon trust, to pay the dividends and annual proceeds thereof to his niece, the said Dame M. G. Palmer during her life for her separate use, and, after her decease, upon trust, to assign and transfer the said Bank Annuities to such one or more of the children of the said Dame M. G. Palmer, other than and except her eldest son for the time being, and in such parts, shares, and proportions, manner and form, as she, notwithstanding any coverture, and whether sole or covert, by any deed or deeds to be executed in the presence of and to be attested by two or more credible witnesses, or by her last will and testament in writing, or any writing in the nature of or purporting to be her last will and testament, to be signed and published by her in the presence of and to be attested by the like number of credible witnesses, should direct and appoint; and, in default of such direction, limitation, or appointment, as to so much thereof whereof no such direction, or limitation, or appointment should be made, to assign and transfer the same unto, between, and among all and every the children of the said Dame M. G. Palmer, other than and except her eldest or only son, &c., &c., with a gift over in default of children of Dame M. G. Palmer.

The Hon. H. Watson died in August, 1833.

On the 16th of February, 1846, by a deed poll and indenture of even date, a part of the fund was appointed on the marriage of Theodosia, a daughter of Dame Mary Grace Palmer.

Dame M. G. Palmer made her will, dated the 21st of November, 1849, reciting the powers of appointment given

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to her by her brother's will; and that she had eight younger children other than her eldest son, and that she had already appointed portions of the said fund, and was now desirous of appointing the unappointed portion. The will then proceeded as follows:—

"Now, in exercise of the powers or authorities to me given by the said will, and of all other powers and authorities(*a*) me in this behalf, I do by this my will limit and appoint, give, and bequeath the sum of 13,181*l.* 5*s.* sterling, being the unappointed part of the sum of 15,000*l.* sterling mentioned in the will of my said brother Lewis Richard Lord Sondes, after deducting the legacy duty payable in respect thereof, and the two several sums of 12,245*l.* 10*s.* 6*d.* 3 per cent. Consolidated Bank Annuities, and 19,200*l.* 3¼ per cent. Bank Annuities, mentioned in the will of my uncle, the said Henry Watson, unto all my younger children, except the said Theodosia Mary Maunsell, in equal shares as tenants in common, and their respective executors, administrators, and assigns, except as to the shares of Grace Trollope and Charlotte Palmer in the said monies, I direct that the same shall be held for their sole benefit, independent of any husband with whom they may respectively marry; and that, after their deaths, I direct that the same shall be divided among their children, in such manner as they may respectively appoint by deed or will, notwithstanding coverture; and in default of appointment, then I appoint the same to an only child wholly, or amongst all such children equally, if more than one; but, in default of my said daughters leaving child or children, then the share of each daughter so dying without child or children, I direct to be equally divided among all my younger sons."

The testatrix then appointed the sum of 25,000*l.* to her

(*a*) *Sic* in orig.

husband for his life, and after his decease, as to 2,000*l.*, part thereof, to her daughter Charlotte Palmer. She then used the following language:—"Provided, nevertheless, that, as to the share of my said daughter Charlotte Palmer of and in the said last-mentioned trust monies, I direct the same to be held for her sole benefit, independent of any husband whom she may marry, and then to be divided among her children, if she has any, in such manner as I have hereinbefore directed with respect to the monies hereinbefore appointed to her and her sister Grace Trollope, under the powers given to me by the wills of my said brother Lord Sondes and my uncle Henry Watson; and in the event of her making no appointment, then the share of my said daughter Charlotte Palmer to go to her only child, if only one, or to all her children equally, if more than one; and, in the event of my said daughter Charlotte Palmer dying without leaving a child or children, then I direct her said share in my separate property to be equally divided among all my sons."

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The testatrix Dame M. G. Palmer died on the 24th of November, 1853. At that date Mrs. Trollope had two children.

On the 1st of March the trustees under Dame M. G. Palmer's will paid the sons their legacy, and transferred Mrs. Trollope's and Miss Charlotte Palmer's shares into Court under the Act.

This petition now asked for the payment out of Court of the fund.

It was admitted at the bar that the appointment by Lady Palmer in favour of her grandchildren was invalid, as being an excess of the power.

Mr. *Archibald Smith* for the petitioners.—The appointment to the petitioners being good, and the appointment to their children void, the result was, that their interests became absolute, or, at all events, only liable to be

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defeated in the event of their dying without leaving any child or children: *Carver* v. *Bowles* (*a*), *Kampf* v. *Jones* (*b*), *Harvey* v. *Tracey* (*c*).

Secondly, it was contended that the word "leaving" in the ultimate limitation must be construed as having, and that therefore the share of Mrs. Trollope, who had had children, had become absolute: *Goymour* v. *Pigge* (*d*).

Mr. *Sidney Smith* for the younger sons of Lady Palmer. —The appointment, so far as it extended to grandchildren, was clearly void, the grandchildren not being objects within the power. The petitioners, Mrs. Trollope and Miss Palmer, were only entitled under the power of appointment to their shares for their lives.

The question then arose as to the remainder, which the donee of the power had attempted but failed effectually to appoint.

It was submitted, that the younger sons of Lady Palmer would take the interest in the fund expectant on the decease of the petitioners under the wills of Lord Sondes and Mr. Watson, by virtue of the gift in default of execution of the power.

This case was distinguishable from *Carver* v. *Bowles* (*a*), and *Kampf* v. *Jones* (*b*).

If the Court should not take that view, the younger sons would be entitled to the fund, or to one moiety of it, in the event of the petitioners or of either of them having no children, under the ultimate limitation in Lady Palmer's will. It was clear that an ultimate limitation, although following a void limitation, was good where it was a gift over to arise on an alternative event: *Crompe* v. *Barrow* (*e*).

By the terms of Lady Palmer's will, the bequest to the petitioners was not an absolute bequest, but was controlled

(*a*) 2 Russ. & My. 301.
(*b*) 2 Keen, 756.
(*c*) 1 Drew. 73—138.
(*d*) 7 Beav. 475—481.
(*e*) 4 Ves. 681.

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and governed by the exception as to the shares of the petitioners,—that, according to the true construction of the will, the whole clause, including the exception, must be read together, and that the intention, whether the gift was absolute or not, must be collected from the whole of the will, and not from there being words which, standing alone, would constitute an absolute gift: *Lassence* v. *Tierney* (*a*), and *Gompertz* v. *Gompertz* (*b*).

The effect of the whole clause in Lady Palmer's will, taken together, was only to give life interests to the petitioners.

Mr. *Hobhouse* appeared for the trustees.

The VICE CHANCELLOR:—

*Judgment.*

The question in this case arises with respect to the right of the petitioners, Mrs. Trollope and Miss Palmer, under the appointment executed by Lady Palmer, their mother. By the wills of her brother, Lord Sondes, and her uncle, Mr. Watson, Lady Palmer had a power of appointment by deed or will over funds of which the property now in question forms a part. By a deed, dated on the 16th of February, 1846, she appointed a portion of the fund in favour of her daughter, Theodosia, as to which no question now arises. The power was large, she might appoint the whole or any portion of the fund to any of her children other than her eldest son, or she might appoint it equally among all her children exclusively of her eldest son.

Had the testatrix gone no further than the gift to Mrs. Trollope and Miss Palmer, no question could have arisen; but each of them would have been entitled to one-seventh part of the fund. Instead of that, she goes on to attempt to cut down that gift by the subsequent direction in favour of their children. There can be no doubt that the attempt is in excess of the power, and therefore void.

The question then arises as to the effect of this invalid disposition in favour of grandchildren, who are not objects of the

(*a*) 1 Mac. & G. 551. (*b*) 2 Ph. 107.

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power. It is contended, that no valid disposition can arise after an invalid appointment; and consequently, that, after the estates for life given to the petitioners, the fund will go to the testatrix's younger children.

In my opinion, the case of *Carver* v. *Bowles* is decisive of this question. In that case, it was held, that, there being a valid appointment, and then an invalid attempt to cut down the interest given by the appointment, the appointee took absolutely. I think that case is an authority that I must follow in dealing with the present case.

But the difficulty here is, that the testatrix has made the right of her daughters, the appointees, to depend on the event of their leaving children. I think, on the true construction of the will, the testatrix intended the gift over only in case her daughters died without having children, and not to depend on the circumstance whether such children should be living at the decease of their mother.

Mrs. Trollope's interest has, therefore, in the event that has happened, become absolute. The share of the other petitioner must abide the event, but in the meantime she will be entitled to the dividends.

*Dec.* 12*th.*

## BROUGHTON *v.* BROUGHTON. BROUGHTON *v.* WHITE.

An executrix employed her co-trustee under the will and his partners, as solicitors, to transact the necessary legal business of the trust:—*Held* (with reluctance), on the authority of *Lincoln* v. *Windsor*, 9 Hare, that the solicitors were entitled only to costs out of pocket.

*Semble*, in such a case, on the principle of *Cradock* v. *Piper* (1 Mac. & G.), that the solicitors are entitled to their fair professional remuneration.

*Aliter* in the case of a sole trustee or executor being a solicitor and employing himself.

THESE were exceptions by Mr. Francis Thirkill White that the Master, by his report, disallowed on taking the accounts the amount of certain bills and costs, except such parts as consisted of money actually paid and disbursed by him the said Francis Thirkill White and his copartners, whereas he ought not to have disallowed such items, &c.

It appeared from the state of facts, that the testator Mr.

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Thos. Broughton, who had carried on business as a brewer, employed Messrs. Thirkill and Rogers as his solicitors, and upon Mr. White succeeding to the business in 1841, employed that gentleman and Mr. Lindsay, whom Mr. White had taken into partnership, as his professional advisers. In 1843, the testator, with the assistance of Mr. White, made a plan for the sale of his real and copyhold estates, with a view to paying off certain incumbrances and judgment debts affecting them, as well as his simple contract debts.

Under the direction of Mr. White and his then partner Mr. Lindsay, the testator advertised the whole property for sale; but, being unable to sell the whole property in one lot, Mr. White and his partner succeeded in disposing of portions of the estate in smaller lots. In 1843, the testator left Boston for Walsoken, near Wisbeach.

In October, 1843, the testator, with the assistance of Mr. White, made his will, by which he devised to his wife and to Mr. White, their heirs and assigns, the whole of his real estates, upon trust that they and the survivor of them should receive the rents and profits of the said estates until sold, and upon further trust, to sell the same by public auction or private contract, and to make and execute all such conveyances and assurances in the law as should be necessary for effectuating such sales; and in case any of his said real estates should be under contract for sale at the time of his decease, then he directed, authorised, and empowered his said trustees and the survivor of them, and the heirs, executors, or administrators of such survivor, to carry into effect and complete all such contracts, and to make and execute all such conveyances and assurances as should be necessary for that purpose; and the said testator thereby directed that his said trustees should stand possessed of the residue of the monies to arise from the sale of his said real and personal estates, upon trust, for the sole benefit of his said wife Sophia Broughton, her executors, administrators, and assigns, to whom he bequeathed the same for her sole use

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and benefit; and the said testator thereby appointed his said wife Sophia Broughton sole executrix of his said will.

The testator died on the 23rd of November, 1843; and at the date of his death, several of the contracts entered into by Mr. White and his partner remained incomplete. At his death there were charges on his estate to the amount of 17,900*l.*, and a judgment debt for 5000*l.* with interest. There was also an action pending, which Mr. White defended on his behalf as his attorney, in which judgment was subsequently signed for 1750*l.*

By the direction of the executrix, Mr. White obtained for her probate of the will. The personal estate was sworn under 4000*l.* In order to exonerate the title to the several lots which had been contracted to be sold, as well as to those which it was desirable to sell, Mr. White, conjointly with the executrix, made himself liable for the sum of 7000*l.*, which was applied in payment of the judgment debt of 5000*l.*, and was subsequently repaid out of the proceeds of the sale. Conveyances of the lots agreed to be sold, partly in the testator's lifetime and partly afterwards, were executed by the executrix and by Mr. White, and delivered to the purchasers by Mr. White; but a considerable portion of the estate remained unsold, in respect of which the executrix addressed to Mr. White the following letter:—

"Walsoken House, near Wisbeach, 20th June, 1844.

"Dear Sir,—Please to take whatever steps you find to be necessary, either in recovering the arrears of rent due to the estate of my late husband, or in giving notices to quit to tenants, and in providing by further sales of the real estates for the discharge of the whole of my late husband's debts and incumbrances, as early as practicable, according to the trusts reposed in us jointly under his will.

"SOPHIA BROUGHTON."

Mr. White subsequently dissolved partnership with Mr.

Lindsay, and entered into partnership with a Mr. Calthrop, with whom he proceeded in the sale of the property.

In October, 1844, Mr. Calthrop had an interview with the executrix relative to the state of the trust property, and the costs incurred by Mr. White and Mr. Calthrop in execution of the trusts; upon which proposals in writing were submitted by Mr. Calthrop to the executrix, who made some alterations; but the following terms were agreed on:—

Mr. Broughton's Affairs.

Propositions by Mrs. S. Broughton.

1. That Mr. Hopkins' present claim be immediately satisfied, so far as the purchase-monies claimed to be received by him will extend.

2. That Mr. Rogers' claim of 1000*l.* and interest be paid out of the monies in hand and those arising from Jackson's and Horney's purchase-monies.

3. That further sales, as may be deemed advisable, be forthwith proceeded with.

4. That, out of the money remaining in hand after the above payments, Mr. White be allowed to retain 500*l.* on account of his bill for business to August last; such bill to remain open for taxation as between attorney and client.

5. That the Bellcany House and Birdale property and land, now occupied by Parker, be offered for sale last of all property, and not then, unless there shall be an evident necessity for the sale.

Mrs. Broughton adopted these proposals, and sent the following letter in reply:—

"Sir,—I inclose the propositions drawn up by Mr. Calthrop, with such alterations as I have thought fit to make in them. It is for you to adopt or reject them as you think proper. I am, yours," &c., &c.

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On the 23rd of October, 1844, Mr. White sent to Mrs. Broughton the following letter:—

"Boston, 23rd of October, 1844.

"Madam—I am favoured with your letter of yesterday inclosing a memorandum of the terms of arrangement previously to proceeding with further sales, as drawn up by Mr. Calthrop, upon his interview with you and your son at Walsoken, on Saturday last, with the alterations as made by you, which I have agreed to and signed. I will now proceed, with the assistance of Mr. Calthrop and your son, to make the requisite arrangements for further sales without delay, the particulars of which shall be submitted to your approval before advertising."

Mr. White and his partner continued to manage the sales of the property under the direction of Mrs. Broughton, up to her death. On the 8th of February, 1845, she addressed to Mr. White the following letter:—

"February 8th, 1845.

"My dear Sir—I am anxious that the future sales should be completed as soon as possible. Let all the public-houses be immediately advertised, as I have no doubt they will sell more readily. There is no necessity for advertising the Home estates again until the public-houses are sold. As to the right of Mr. Rogers being consulted relative to the Home estate, it is a matter of indifference to me. Already my family have had too many proofs of his feeling towards them to expect any mercy at his hands. The Belcany House, Birdale Land, and Rosegarth Pasture, I think, had better not be advertised at present. I will write to you again and send you what I think should be the reserved price. I shall be glad at any time to receive your suggestions relative to the future sales. "Yours truly,

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On the 19th December, Mr. White received the following letter:—

"Sir,—In answer to your letter, I beg to observe, that my late husband directed that the rents shall be applied to keep down the interest, and I expect you, therefore, to comply with it. I request to be furnished with a statement of what you consider primary charges upon the estate; also of all accounts up to the present time. You appear very anxious for further sales, but in that matter you will wait my directions. Yours, &c.,

SOPHIA BROUGHTON."

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Mrs. Broughton died subsequently.

The case stated that Mr. White, from his local knowledge and acquaintance with the particular property, with the assistance of Mrs. Broughton and her son, and without calling in any professional valuer, took particulars of the entire estates, and made estimates of value, which were very slightly below the amount for which the property was sold.

The case stated, that there was due from the testator to Mr. White as co-partner of the firms of Rogers & White, and White & Lindsay, the sum of 200*l.* 1*s.* 2*d.* for business done in the lifetime of the testator. That there was due from the estate of the testator to the firm of White & Lindsay, for bills of costs, charges, and expenses properly incurred, 608*l.* 2*s.* 8*d.* on account of which Mr. White received 500*l.* from the executrix, leaving a balance of 108*l.* 2*s.* 8*d.*

That there was due to the firm of White & Calthrop the sum of 789*l.* 18*s.* 11*d.*, making a total of 898*l.* 1*s.* 7*d.*

*Argument.*

Mr. *Malins* and Mr. *J. H. Palmer* in support of the exceptions.—The true principle of the decisions is, that a trustee or executor, who is a solicitor, shall not make a profit of his trusteeship or executorship, and *not* that a trustee or executor shall be compelled to render professional

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services by reason of his office, or, if he does render such services, that he shall not be paid for them, provided the estate be put to no *extra* expense: *Robinson* v. *Petts* (*a*). In *Sheriff* v. *Axe* (*b*), the same principle was acted on by the Court in the case of an agent. No doubt the decisions had in later times been extended to the case of solicitors, members of a firm; but still the principle was the same, viz. that the estate should be put to no extra expense. In *Christophers* v. *White* (*c*), the Court would not allow the estate to be charged with the costs of business done by the partner of the trustee. There, however, the case was put thus by Lord *Langdale*, p. 525, "Would this Court allow a trustee to say to his partner, you shall act as solicitor, and earn all the profit you can for the concern?" This was no more than another expression for the well-established rule, that a trustee must not be permitted to make a profit of his trusteeship. The case of *Collins* v. *Carey* (*d*) was to the same effect as *Christophers* v. *White*. *Fraser* v. *Palmer* (*e*), *New* v. *Jones* (*f*), and *Todd* v. *Wilson* (*g*), were referable to the same principle.

Then came the case of *Cradock* v. *Piper* (*h*), which distinctly developed the principle on which the prior decisions had proceeded. Lord *Cottenham*, in his judgment, reviewed all the authorities (*i*), and modified the strictness of the supposed rule, that a solicitor, who is a trustee, can in no case receive costs out of the trust estate. "The rule," observes that learned Judge, (page 680), "does not extend beyond the costs of the trustee, where he acts as solicitor for himself." This was reverting to the principle on which the authorities had in effect gone, that a trustee was not to make his office a source of emolument to himself.

(*a*) 3 P. Wms. 249.
(*b*) 4 Russ. 33.
(*c*) 10 Beav. 523.
(*d*) 2 Beav. 128.
(*e*) 4 Y. & C. 515.
(*f*) 9 Bythewood's Conveyancing, by Jarman, p. 338. 9 Aug. 1833.
(*g*) 9 Beav. 486.
(*h*) 1 Mac. & G. 664.
(*i*) See pages 668-9.

In this particular case the circumstances are exactly what Lord *Cottenham* in the case of *Moore* v. *Frowd*(*a*) thought might properly be done. His language is, "that the parties may by contract agree, that a trustee, being a solicitor, shall have some benefit beyond that which, without such contract, the law would have allowed." Here Mrs. Broughton was the residuary legatee, and the solicitor acted under her direction, and on the distinct understanding that he should be paid for his professional services. This case, therefore, was not so much the case of a trustee and solicitor acting in the trust by reason of his office, as that of a solicitor acting by the direction of the cestui que trust. The question really came to this, was the solicitor, who had in the lifetime of the testator acted for him, and after his decease for and by the direction of his executrix, to be deprived of his costs merely because the testator had named him as trustee in his will.

Mr. *Bacon* and Mr. *Chapman Barker* in support of Master *Kindersley's* finding.—This case is covered by authority. The decisions are uniform down to *Cradock* v. *Piper*, that a trustee who is a solicitor shall not be allowed remuneration for his professional services.

In *Moore* v. *Frowd*, the costs of the suit were not under the consideration of the Court.

Then did *Cradock* v. *Piper* vary the rule? Clearly not. That case decided, that, where one of several trustees acted in the defence of a suit for his co-trustees and himself (for they could not sever), the mere circumstance that one of the trustees was a solicitor and acted for the others should not deprive those others and their solicitor of the costs which they would otherwise have as a matter of course. It would appear also from the order, page 685, that any costs which might be occasioned by reason of the solicitor being trustee were disallowed. It was quite clear, that, if the Court had

(*a*) 3 My. & Cr. 48.

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disallowed those costs as between party and party, the solicitor would be entitled to receive them from the client who employed him, viz. his co-trustees. That case, therefore, merely decides what was not contested, that the mere fact that one of the trustees being a solicitor does not disentitle the others to their costs properly incurred.

But further.—The costs allowed in *Cradock* v. *Piper* were the costs of defending a suit in this Court, not the costs of the plaintiff, who takes the initiative, but costs in incurring which the trustees had no option. Here there was no suit at all, and these costs, therefore, were not within the rule in *Cradock* v. *Piper*. In *Lincoln* v. *Windsor* (*a*), Vice-Chancellor *Turner* had held, that that case applied only to the costs of suit.

Mr. *Malins*.—There is nothing in *Cradock* v. *Piper* to support such a distinction. No doubt, as a fact, the costs there allowed were costs of suit; but if that circumstance were to support such a distinction, there would be an end to any appeal to authority, because no case ever tallied so exactly with another as to be identical in all its details.

*Judgment.*

The VICE-CHANCELLOR:—

The only question before me is, whether this gentleman, Mr. White, being a solicitor, and having been, together with the testator's widow, a co-trustee under his will, is to be allowed the costs which both trustees have incurred in the execution of the trusts of the will to that firm of solicitors of which Mr. White is a partner. There is no doubt as to the rule of the Court upon this subject. The rule of the Court is founded upon a principle of policy that a trustee shall not be allowed to make a profit of his trusteeship. A solicitor, who is a trustee, is not at liberty to employ himself and to gain for himself the emoluments of a solicitor in acting on his own behalf as a trustee. That

(*a*) 9 Hare, 158.

principle of policy extends not only to the costs to be incurred in the administration of the estate out of Court, but also to the costs of a suit in Court.

I understand the opinion of Lord *Cottenham* to be, that a solicitor being a trustee and a sole defendant in a suit, is not in that suit to be allowed more than his costs out of pocket.

In the case of *Moore* v. *Frowd*, the Court had to deal with the costs, charges, and expenses of four trustees who were all four solicitors. Mr. *Bacon* has satisfied me, and a reference to the Registrar's Book has also satisfied me, that, in the case of *Moore* v. *Frowd*, the costs of the suit were not in the consideration of the Court; but the Court, applying the rule in that case where the four trustees were all four solicitors, disallowed to them the costs of the administration out of Court, and all costs, charges, and expenses that were not mere outlay. That decision deprived them of all emolument and remuneration for their labour, to which, had they not been trustees, they would have been entitled. Therefore the rule of the Court in this respect is quite plain.

By decision, the rule has been carried further. The Master of the Rolls (Lord *Langdale*) decided, in the case of *Christophers* v. *White*, that, where there was a firm of solicitors, who had bestowed their work and labour in the matter, and claimed fair and reasonable remuneration for their services, the mere fact that one of them was a trustee was enough to annihilate the right, by the other partner of the firm, who was not a trustee, to receive remuneration. That decision has been followed by the Vice-Chancellor, now Lord Justice *Turner;* and although I acknowledge, that, according to my own sense of justice and of that reasonable modification of the strict rule which ought to be adopted by this Court in the application of it, I cannot understand why the rule was not modified in that case, or why it was so harshly applied as to deprive a

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*Judgment.*

solicitor, who is not a trustee, and who gave his work and labour, of his just remuneration; yet, it is not my duty, nor have I the power, to correct the decisions of other Judges, or to do more than follow what I find to be the established rule of the Court. I can only express my hope that the time may come when those who have the authority—which it would be presumptuous in me to arrogate to myself—will exercise that authority, and, upon a fair review of the matter, put the law in that respect on a satisfactory footing, either by altering the rule or by establishing it upon some reasonable grounds, which have never yet been stated—such as will satisfy every lawyer and the public that it is a proper rule to apply in such a case.

But it is satisfactory to me to find, that, in the case of *Craddock* v. *Piper*, Lord *Cottenham* materially modified the rule, though that modification did not go to such an extent as to enable me in this case to do what the dictates of my own understanding as a lawyer would induce me otherwise to do.

Lord *Cottenham*, in *Cradock* v. *Piper*, decided, that, if in the conduct of a suit there be several trustees, of whom one is a solicitor, and all the trustees join in one defence, in the conduct of which that individual who is a solicitor also joins and acts, unless it can be shewn that the costs were increased by his having been joined in the defence with his co-trustees, the full costs are to be allowed to the whole set of trustees, although one of them was a solicitor. Lord *Cottenham* has stated that rule with his usual perspicuity and clearness, and the principle upon which he proceeds with regard to that rule. He says, it is no part of the technical rule which deprives a solicitor, who is a trustee, of his professional costs in the trusteeship, to extend that rule to the case of a solicitor, a trustee, employed by his co-trustees. His language is this—"A trustee, as trustee, is not to make his office a source of remuneration; but the question is, whether acting for other co-trustees is an act-

ing arising out of his office? If A. is a trustee of a fund, and employs himself, this is clearly within the rule; but it is not the same thing if there are other parties, and they come and employ him, though his employment may arise incidentally out of his being a trustee."

Now these observations of Lord *Cottenham* occur in a case in which he was speaking only of the costs of a suit, that is unquestionable. But the proposition there laid down would extend exactly to such a case as the present, as will appear on the slightest examination. Mrs. Broughton and Mr. White, the solicitor, are the two trustees named in the will. It is necessary to employ a professional man to transact the business of a sale, so far as that business requires the assistance of a professional man. It is no part of the business of a trustee to prepare conditions of sale, or to act as a solicitor ought to act; nor is any trustee, being a solicitor, bound to discharge for the trust estate the business of a solicitor. In the case of a trusteeship, therefore, any trustee, being a solicitor, would naturally employ another solicitor to transact the business; he would do so because he must know that the rule of the Court prevents his being remunerated for his professional employment in the conduct of the trusteeship. Here, then, are two trustees, one a solicitor, and the other not, and the necessity arises for employing a professional man. It is quite clear, that, inasmuch as it was the duty of Mrs. Broughton as trustee to employ some solicitor, she elected to employ Mr. White. In like manner in the case of *Cradock* v. *Piper*, where there were three trustees defendants, one of whom was a solicitor, and had entered the appearance and conducted the defence of the suit, Lord *Cottenham* treated that one as employed by the others, upon the same principle as I should have felt myself bound to consider Mr. White here as employed by his co-trustee to give, what no trustee could be without, professional assistance. The principle seems to be the same in both cases, because Lord *Cottenham*, in his

*Semble*, where a solicitor being trustee is employed by his co-trustee to transact professional business necessary in the execution of the trust, he is entitled to his costs; especially if the business be transacted by a firm of which he is a partner.

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*Judgment.*

decision, goes on this principle, that it is no part of the business of a trustee to act as a solicitor in any way, not even in the defence of a suit; and on that principle he decided the case. But how can it be different as to managing a sale out of Court? That surely is no part of his duty as trustee; it is an employment in another sphere. Lord *Cottenham* says, in a suit there is nothing to prevent a trustee employing his co-trustee, being a solicitor, in the proper business of a solicitor, which must be done by some solicitor; but if any extraordinary expense is occasioned by reason of that employment, the trust estate is not to be burdened with such extra expense. In this case, I asked whether any extraordinary expense had been occasioned to the trust estate by Mrs. Broughton having chosen to employ her co-trustee as a solicitor; and it is very properly admitted that no such extra expense was occasioned. The words of the proposition that I have read, as stated by Lord *Cottenham*, are plain, general words, conveying an intelligible principle, and they are these, that where a sole trustee is a solicitor, he is to be allowed no remuneration in a professional shape for his professional business as a solicitor, because he has been employed by nobody but himself, and he is deriving a remuneration to himself and a profit from his office.

That principle applies to the case of one trustee being a solicitor and being a defendant in a cause, and it applies equally to business done by him not as a defendant in a cause. It applies in the case of *Moore* v. *Frowd* to all four solicitors, being all four employing themselves, and all four acting and obtaining remuneration from the exercise of the duties of their office.

Where, however, one trustee is a solicitor, and is employing another or others, the principle of *Cradock* v. *Piper* would seem equally applicable as to the costs of a suit and as to all other costs.

I have endeavoured to explain why, in my opinion, the principle of the rule must apply just as much to any class

of business, properly the business of a solicitor done in the administration of the trust estate not in the presence of this Court, as to the business of a solicitor, properly the business of a solicitor, done under the eye of the Court, and in the course of a cause. I should, therefore, have been glad to apply the modification of the rule so clearly and intelligibly stated by Lord *Cottenham* to the present case, because I find in this case, as Lord *Cottenham* found in *Cradock* v. *Piper*, that, by allowing these payments to a solicitor, who was one of several trustees who had concurred in the employment of him where some solicitor must have been employed, the trust estate was put to no additional expense at all.

Such would be my own inclination; but when I find, in the first place, that the Master, now a Vice-Chancellor, whose decision I am called upon to overrule, with the case of *Cradock* v. *Piper* before him, came to an opposite conclusion; and when I find that Vice-Chancellor *Turner*, now one of the Lord Justices, has, in another case, taken the same view as Vice-Chancellor *Kindersley*, which case I am now asked to overrule, and has said that the principle of *Cradock* v. *Piper* is applicable simply to the case of the costs of a suit, and cannot, and ought not, and was not intended to be applied to costs incurred, not costs of a suit, though otherwise costs properly incurred—I do not find myself at liberty to act upon my own view of the principle, or upon my own opinion of what Lord *Cottenham* would have done had this case been before him; but I must leave this case as I find it, governed by the opinion of Vice-Chancellor *Turner*, and must yield, as I do willingly, the dictates of my own judgment to the judgment of those learned lawyers, who have come to a different conclusion.

I can only express a wish, and I do it sincerely, that this matter were more fully considered than I think it was considered in the case of *Lincoln* v. *Windsor;* because I think it is quite possible, upon reconsideration, that a different

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view of the rule might be taken. But no surmise of mine on that subject is a sufficient justification to me for overruling repeated decisions of the Court.

This case is also distinguished by the peculiar circumstance, that, not only is the trust estate relieved from all those costs which must have been incurred, (which I think is a very improper and dishonest relief), but I am under the painful necessity, from the constraint imposed on me in the exercise of my duty in this case, of depriving another respectable professional man of remuneration for the labour and attention he has bestowed upon the affairs of this trust estate, I mean the partner of Mr. White, who has acted in the business, and who, by this view of the law, is affected in the discharge of his professional duties with the infirmity of having to act as the partner of a trustee. That is another extension of the principle, and, perhaps, upon reconsideration, may not be adhered to. At present I cannot depart from it, and I therefore leave this case, with this observation, that I cannot adopt the suggestion that has been made, that this case is not a case of cestui que trusts and trustee. In my opinion, there is no distinction, in that respect, between this case and those that have been cited in the course of the argument.

The costs of the exceptions will follow the ordinary rule.

Affd. 5 De G. M. & G. 160.

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## PAXTON *v.* NEWTON.

*Nov 9th.*

THIS was a claim for the specific performance of an agreement for a lease.

Agreement to grant a lease of copyhold premises for twenty-one years, and to put the same in repair, there being no evidence that to grant such lease would work a forfeiture, or that the license of the lord could not be obtained:—*Decreed* to be specifically performed.

Though the Court will not ordinarily decree specific performance of an agreement to repair, it is the habit of the Court to decree specific performance of agreements involving the execution of leases, or other instruments containing covenants to repair.

The memorandum of agreement between James Newton, of the Uxbridge Road, Ealing, in the county of Middlesex, wheelwright, of the one part, and John Paxton, of Maddock Lane, Ealing, of the other part, was as follows:—The said James Newton agrees to let, and the said John Paxton agrees to take, all those premises situate in the Uxbridge Road, Ealing, Middlesex, consisting of two dwelling-houses, sheds, workshops, and all appurtenances, now in the joint occupation of the said James Newton and Thomas Newton, his son, for the yearly rental of 30*l.* per annum, payable on the usual quarterly days, 25th of March, 24th of June, 29th of September, and 25th of December, the first quarterly payment to become due on the 29th of September, 1854. The said James Newton agrees to grant to the said John Paxton, his heirs, executors, administrators, and assigns, a lease of the within-named premises, for twenty-one years, at the same rental, viz. 30*l.* per annum, such lease to contain the usual covenants, and the expense of such lease to be paid for jointly by the said James Newton and John Paxton. The said John Paxton also agrees to pay all rates and taxes, land-tax excepted; and the said James Newton agrees to pay all rates and taxes of the said premises up to the 24th day of June, 1854; and the said James Newton further agrees to put the houses and premises in tenantable repair and to put up a new fence in the front within twelve months from this date, the new house to be finished by the 24th day of June, 1854, fit for habitation. And the said John Paxton agrees with the said James Newton, that he the said John Paxton will keep the said premises in repair; and the said James Newton agrees to allow the said John Paxton to re-

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move all outbuildings he may erect or cause to be erected on the said premises, or to take them at a fair valuation at the expiration of the lease; and further, should the said John Paxton be desirous of purchasing the said premises during the tenancy, the said James Newton also agrees to sell unto the said John Paxton, his heirs, executors, and administrators or assigns, the within-named premises for the sum of 600*l.* And, lastly, the said John Paxton agrees with the said James Newton not to let to Thomas Newton, the son of the said James Newton, either of the above-named premises during the lifetime of Sophia Newton, wife of the said Thomas Newton. As witness our hands this twenty-ninth day of April, 1854. "JOHN PAXTON,

"Witness STEPHEN GRANGE. "JAMES NEWTON, X."

The defendant, by his affidavit, deposed, that, at the time he entered into the said agreement, he was ignorant, not having taken legal advice on the subject and no professional person having been employed in the preparation thereof; that he had no power to comply with the terms contained in such agreement as to granting a lease of the premises therein mentioned, having previously thereto, viz. on the 31st of August, 1853, by a conditional surrender, bearing date that day, surrendered the said premises unto the lord of the manor of Ealing, of which the same were holden, for securing to John Dalton 200*l.*, with interest at 5 per cent.; that the said sum was still due; and that he had, prior and subsequently to the institution of the suit, applied to the mortgagee to concur in granting a lease to the plaintiff, but that he had refused.

*Argument.*

Mr. *Chichester* now appeared for the plaintiff, and asked for a decree for specific performance of the agreement.

Mr. *Speed*, for the defendant, contended that in this case the Court would leave the plaintiff to his legal remedy.

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*Argument.*

The property was copyhold, and the plaintiff had no power to grant a lease for twenty-one years.

Secondly—The property was in mortgage, and the mortgagee refused to concur in granting a lease. It was quite obvious, therefore, that, if this Court were to make the order sought by the plaintiff, the defendant could not obey it. It was submitted that this Court would not place a defendant in such a position. There was no rule better established than that this Court would not direct a part only of an agreement to be performed: *Hills* v. *Croll* (*a*), *Dietrichsen* v. *Cabburn* (*b*). The material part of the agreement was, that the premises should be put in repair.

This was, therefore, in effect, an attempt to obtain a decree for specific performance of an agreement to repair the premises, a species of jurisdiction which it was well settled this Court would not exercise: *Hill* v. *Barkly* (*c*), *Kimberly* v. *Jennings* (*d*), overruled by *Lumley* v. *Wagner* (*e*), *Lucas* v. *Comerford* (*f*), and *Mosely* v. *Virgin* (*g*).

Mr. *Chichester* replied.

The VICE-CHANCELLOR:—

*Judgment.*

This is a bill for the specific performance of an agreement for a term of twenty-one years. The conditions are defined; everything is certain. Nevertheless the right of the plaintiff is resisted by the defendant, because the property agreed to be let is copyhold; and there the case stops as to that part of the defence. He does not say, that, to grant a lease for twenty-one years will work a forfeiture by the custom of the manor, unless he has the lord's license; nor does he say (if such were the custom) that he has applied to the lord for a license to enable him honestly to perform his agreement. Generally, no doubt, a lease for

(*a*) 2 Ph. 60.
(*b*) Ibid. 52.
(*c*) 16 Ves. 402.
(*d*) 6 Sim. 340.
(*e*) 1 De G., Mac. & G. 604.
(*f*) 3 Br. Chanc. Cas. 166.
(*g*) 3 Ves. jun. 184.

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twenty-one years cannot be granted of copyhold property; but here no evidence of the custom of the manor has been brought before me. There can be no doubt that leases are granted of copyhold property de anno in annum; the fact, therefore, that the subject-matter of the agreement is copyhold is no reason why it should not be specifically performed.

The second objection raised is, that the estate was in mortgage; which the plaintiff must have well known when he entered into the agreement. But what of that? I am yet to learn that a valid lease of the equity of redemption cannot be granted by the mortgagor. No question has been raised as to the title, because the plaintiff is willing to take the best title that the defendant can make.

The next objection raised it has been sought to establish on authority. It is contended that the Court cannot decree specific performance of an agreement to repair; but, even admitting that principle, it is well settled that the Court is in the habit of decreeing specific performance of agreements for the execution of leases containing covenants to repair; and, on looking at this agreement, I see no reason to suppose that there may not be introduced into this lease such covenants as will enable the plaintiff to obtain a proper remedy as to the repairs. I must, therefore, decree specific performance.

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## HAWKINS *v.* GARDINER.

*July 7th.*

Purchase money proved to have been left in the hands of the purchaser as an indemnity in the year 1796, but for which a receipt was indorsed on the conveyance, the evidence being in the recitals of a deed contemporaneous with the purchase and executed in order to enable the purchase to be completed, and these recitals stating trusts of the fund under which the plaintiffs were entitled in remainder after two life estates, the last of which expired in 1845: *Held*, that, as the plaintiffs' title in possession did not accrue till 1845, they were entitled, on a bill filed in 1852, to have the trust fund made good out of the assets (real estate) of the purchaser who had died in 1811.

By an indenture, dated the 15th of April, 1763, upon the marriage of William Oland and Grace Toose, certain lands within the manor of Wellington, being the property of the said intended husband, were conveyed to Thomas Greedy and John Yea, on trust, for the use and behoof of the said husband until the marriage, and from and after such marriage in trust for the said William Oland for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, remainder to the use of the intended wife for life; and from and after her decease in trust to trustees for a term of years since determined, with remainder in tail male to the sons, and in tail female to the daughters of the said husband and wife as tenants in common, with cross-remainders, &c., &c.

The marriage was soon after celebrated, and Wm. Oland died subsequently, leaving Grace Oland his widow, and Mary Oland, her only daughter and heiress at law, him surviving.

In February, 1796, Mary Oland, the heiress at law of William Oland and Grace Oland his widow, contracted and agreed to sell the estate to Thomas Wood; and the title to the estate being defective, the following scheme was adopted:—

By an indenture, dated the 6th of February, 1796, between Grace Oland of the first part, Mary Oland of the second part, John Minie Poole of the third part, by which a fine was covenanted to be and was levied, reciting the indenture of the 15th of April, 1763; and that William Oland was then dead, leaving Grace Oland his widow, and Mary Oland, his only child and heiress at law; and reciting that the said Grace Oland had agreed with the said Mary Oland for the absolute purchase of the said estate for the

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sum of 630*l.*, which said sum it was agreed that Grace Oland should set over and assign to Thomas Wood, upon trust to pay the interest of the said sum of 630*l.* to Grace Oland for her life; and after her decease to Mary Oland for life, for her separate use; and after her decease to pay the principal to Ann Oland, the natural child of the said Mary Oland by Baker Toose; and for all and every the children of the said Mary Oland by the first husband she might marry; and for the considerations therein mentioned, the land was assured to the use of John M. Poole, his heirs, in trust &c. for Grace Oland, and her heirs for ever.

Mary Oland and Grace Oland, immediately afterwards, agreed for the absolute sale of the estate (*a*) to Thomas Wood for the sum of 630*l.*; and it was further agreed, that the sum of 630*l.* should remain in the hands of Thomas Wood, as an indemnity to him in case he should be disturbed in his possession, until a legitimate child of Mary Oland, entitled to an estate tail under the settlement of 1763, should attain twenty-one, or if there were no such child, until the heir of Mary Oland, at the time of her decease, should have confirmed the sale.

By indentures of lease and release, dated the 1st and 2nd of March, 1796, between Grace Oland of the first part, J. M. Poole of the third part, Thomas Wood of the fourth part, and John Carpenter of the fifth part, the said estate, in consideration of the sum of 630*l.*, was conveyed to the said Thomas Wood; and in pursuance of the agreement to that effect, the sum of 630*l.* was allowed to remain in his hands, as an indemnity. A receipt for the sum of 630*l.*, signed by the said Grace Oland and Mary Oland, was indorsed on the deed.

By indentures of lease and release, dated the 1st and 2nd of March, 1796, between Grace Oland of the first part, Mary Oland of the second part, Baker Toose of the third

(*a*) *Sic* in original.

part, and Thomas Wood of the fourth part, reciting the sale of the estate; and that the sum of 630*l.* had been accordingly retained by Thomas Wood, pursuant to the agreement, he paying the interest; and that a marriage was in contemplation between Baker Toose and Mary Oland; and that it had been agreed, that, in order to make some provision for the said Mary Oland for her life, and as well for Ann Oland, the illegitimate child of Mary Oland, as for the other issue of the marriage, the said sum of 630*l.* should remain in the hands of the said Thomas Wood, his heirs, executors, and administrators, upon, under, subject, and liable to the said several trusts, intents, provisions, &c., thereinafter expressed, and hereinafter mentioned. It was thereby witnessed, that, in pursuance of the said agreement, and in consideration of the said intended marriage, and to the intent that the said sum of 630*l.*, and the interest thereof, might be secured and applied upon the trusts thereinafter declared and hereinafter mentioned, it was thereby agreed between the said parties, that the said sum of 630*l.* purchase money should still remain in the hands of the said Thomas Wood, his heirs, executors, administrators, and assigns; and the said Thomas Wood did thereby for himself, his heirs, executors, and administrators, covenant with the said Grace Oland, Baker Toose, and Mary, his then intended wife, that he the said Thomas Wood, his executors and administrators, would stand possessed of the said sum of 630*l.*, and the interest thereof, upon the trusts, and to and for the ends, intents, and purposes, and with, under, and subject to the former provisions, upon trust, during the life of the said Mary Oland, or until a legitimate child, who should be capable of confirming the said estate to the said Thomas Wood, should have attained the age of twenty-one, and should so confirm the same, or, in case Mary Oland died without lawful issue, until the heir-at-law of the said Mary Oland should confirm the said estate, by and out of the said sum of 630*l.* to reimburse and indemnify himself and them-

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selves, and the said hereditaments, against all costs, damages, and expenses which the said Thomas Wood should be put to on account of any inability of the said Mary Oland to sell the said hereditaments to the said Thomas Wood, and subject thereto upon trust to pay the same to the said Mary Oland, her executors, administrators, and assigns, until the said intended marriage; and from and after such marriage, on trust to pay the annual produce into the proper hands of the said Mary Oland, or to such persons as she should in writing appoint, &c.; and after the decease of the said Mary Oland, then as to the said principal sum of 630*l.*, or so much thereof as should be then due, or be remaining in the hands of the said Thomas Wood, upon trust for the said Ann Oland, otherwise Toose, and all and every the children of the said Baker Toose by the said Mary Oland, as the said Mary Oland should by deed or will appoint among such children equally; and if there should be no children of the said Mary, then for the said Ann Oland, &c.

The settlement likewise contained a covenant by Thomas Wood, that, so long as the sum of 630*l.* remained in his hands, he would pay interest at 4*l.* 5*s.* per cent.; and also, that he, his executors, administrators, and assigns would pay and apply the interest and principal upon the trusts and for the purpose therein expressed. There was also the usual proviso that the said trustee Thomas Wood, his heirs, &c., should not be answerable for any loss or damage by placing the monies in any bank, otherwise than in case of lawful default.

The settlement was executed by the husband and wife, but was not executed by Thomas Wood, although he acted in the trusts thereof. There were two children of the marriage, who together with Ann Oland were co-plaintiffs in the suit. In February, 1800, Thomas Wood sold the trust estates to Thomas Fox, and the parties entitled under the trust deed executed a release to the purchaser.

Grace Oland died in 1805, and Mary Oland in June, 1846, without having exercised her power of appointment.

Thomas Wood regularly paid interest on the sum of 630*l.* up to the time of his death in 1811; and by his will, bearing date the 14th of May in that year, after giving certain legacies, he demised his real estates to trustees, to the use of his brother-in-law John Carpenter, for life; remainder to his wife Jane Carpenter for life; remainder to J. P. Carpenter for life, with certain trusts for such of his children as should attain twenty-one; and in default of such children, upon trust for the defendants, the children of John Carpenter, with a joint power of appointment. The will also charged all the estates over which the testator had a disposing power with the payment of his just debts, funeral and testamentary expenses, and legacies, and appointed John Carpenter the sole executor of his will.

John Carpenter never proved the will, but continued nevertheless to act in the trusts thereof until 1816, when a commission of bankruptcy issued against himself and his son John P. Carpenter.

In 1819, Mary Toose applied to him, through a Mr. Steele, respecting the trust estates; on which occasion he delivered to Mr. Steele, on her behalf, the trust deed of the 1st and 2nd of March, 1796.

John Bindon, the surviving trustee of the estates devised by Thomas Wood, entered into possession and received the rents and profits until 1846, when he devised them to his son James Bindon.

In 1849, J. P. Carpenter died without children, leaving Betsy Gardiner and Jane Hooman his co-heiresses; who on his death became entitled in possession to the estate devised, under the limitation in the will of Thomas Wood. Shortly after the death of J. P. Carpenter, Jane Hooman died, leaving Henry Hooman, her heir-at-law, who, in conjunction with Betsy Gardiner, brought actions in ejectment against James Bindon, and recovered the estate devised by Thomas Wood.

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On the 6th of April, 1852, the plaintiffs filed this bill against the devisees of the will of Thomas Wood, praying that it might be declared that the estates devised by his will were liable to make good the sum of 630*l.*, with interest at 4*l.* 5*s.* per cent., from the death of Mary Toose, and that the defendants might be decreed to pay the said sum of 630*l.* and interest, together with the costs of the suit, or that a sufficient part of the devised estates might be sold for effecting such purposes as aforesaid.

*Argument.*

Mr. *Wigram* and Mr. *Elderton* for the plaintiffs.—By the deed of February, 1796, which was established in evidence, Grace Oland, the mother, agreed to purchase from Mary Oland, her daughter, the estate of the daughter for 630*l.* By that deed it was also recited that Thomas Wood had agreed to purchase the estate from Grace and Mary Oland, and that the purchase money should be assigned to them upon certain trusts for the benefit of Grace Oland for life; remainder to Mary Oland for life, with trusts for her children. Then came the deeds of the 1st and 2nd of March, by which the estates were conveyed to Thomas Wood in pursuance of the agreement. The third deeds, also bearing date the 2nd and 3rd of March, 1796, made in contemplation of the marriage of Mary Oland with Baker Toose, and reciting the sale of the estate to Thomas Wood, and that the price had been retained by him pursuant to the agreement, then proceeded to describe the trusts of the said purchase money. Here, therefore, was clear evidence that Thomas Wood purchased the estate without payment of the purchase money, which remained in his hands both as an indemnity to himself and also as the trustee of the settlement made upon the marriage of the vendor. *A priori*, therefore, the plaintiffs were entitled to recover against the estate of Thomas Wood.

It was said, however, first, that the marriage settlement of the 1st and 2nd of March had never been executed by Wood. It was quite clear, however, that he took the estate,

inasmuch as in 1800 he sold it to a gentleman named Fox, by whom it was conveyed by a deed which recited the deed of February, 1799.

It is admitted that the formal deed declaring the trusts was not executed by Wood; but it had remained in his possession till his death, and was delivered by his devisee to the plaintiff's mother. It was not competent, therefore, for a trustee, who had in part at least acted in the trust, to repudiate the rest, or to protect himself by the mere circumstance that although he acted in the trusts he had never executed the deed.

Then it was said, that, inasmuch as on the conveyance to Wood a receipt for the purchase money was indorsed, such receipt must be taken to be conclusive against the plaintiffs. It is obvious, however, that, after the trust deed was executed by Mary Oland, Wood could not have paid over the money without being guilty of a breach of trust. The receipt was not improperly indorsed, because on the execution of the conveyance Wood ceased to hold the purchase money in his own right. He was entitled, therefore, to an acquittance as purchaser, if only to enable him to resell the estate without difficulty.

It was extremely unlikely that he could have paid the purchase money to the vendors: because, first, he would have been without that indemnity as to title for which he stipulated; secondly, he must have paid the money to vendors, who had executed a deed authorising him to retain it in his own hands to indemnify himself, and subject thereto in trust for persons to whom as trustee he would be liable to account. Every circumstance in the case, therefore, negatived the presumption that the money was paid.

Then it would be contended that the plaintiffs' right was barred by lapse of time. But the tenant for life of the fund only died in 1846, whereupon the plaintiffs' right in possession accrued, and the bill was filed in 1852. Secondly, this was a case of express trust, against which it was well settled

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*Argument.*

no lapse of time could operate as a bar. The interest, it was submitted, would follow the same rule as the principal.

Mr. *Bacon* and Mr. *Goldsmidt* for the defendants.—The foundation of the plaintiffs' case fails, inasmuch as it is admitted the alleged trustee never executed the deed of trust. Unquestionably, the Court would not allow a trustee who had acted in the trust to escape on the mere ground of non-execution of the trust deed; but what evidence was there here that Wood ever acted in the trust at all? He purchased the estate and re-sold it; but that was no part of his duty as trustee. He took a conveyance to himself as purchaser, and a receipt for the purchase money was endorsed on the deed—a circumstance of itself that served to demonstrate that he paid his purchase money as purchaser and declined the duty of trustee. It was true, nearly twenty years afterwards, a deed, declaring certain trusts in which Wood was named as trustee, but not executed by him, was found among his papers; but surely this was not such evidence, as to make his estate liable for money, for the payment of which fifty years ago the vendor's receipt was in evidence. Yet that was in fact all the evidence against Wood's estate which the plaintiffs had been able to produce.

If, then, the plaintiffs failed in establishing that Wood was their trustee, their case must fail by reason of the lapse of time.

Why was not this suit instituted long ago? If it had been, the plaintiffs, supposing they succeeded in establishing their title, might have recovered against the personal estate of Wood. The effect of their laches was, that the personal estate was gone, and they now asked relief against Wood's devised estates. It was submitted, that the Court would not relieve plaintiffs whose delay operated so prejudicially against the defendants.

Supposing, however, the Court determined in favour of

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*Argument.*

the plaintiffs' right to recover the principal, then would arise the question of interest. It was contended that interest could only be given from the date of the filing of the bill.

In *Hughes* v. *Williams*(*a*), where a legacy was given by a testator, subject to which his real estates were devised to other persons, and the legatee after the lapse of thirty-three years instituted proceedings to recover the legacy, the Court gave interest only for six years from the filing of the bill. In *Francis* v. *Grover*(*b*), where, the testator having died in 1803, an annuity was paid up to 1827, and a bill filed in 1844 to recover the arrears, the Court refused to allow the plaintiff to recover more than the arrears for six years from the filing of the bill. This was a still stronger case both as regarded the length of time and the hardship on the defendant.

The VICE-CHANCELLOR:—

*Judgment.*

The great difficulty in this case arises from the length of time over which the evidence must extend, in order to shew the plaintiffs' title. The plaintiffs are obliged to shew, that, in the year 1796, the trust was created in their favour, of which by this bill they claim the benefit.

There are in evidence three instruments, one of them being the declaration of trust of the fund in question, which it is admitted was not executed by Mr. Wood. This first instrument is essential to the title of Mr. Wood, who completed his purchase upon the footing of it. It is a deed of February, 1796, by which, with a view to enable Mr. Wood safely, according to the advice he received, to become the purchaser, the grandmother of the plaintiffs is made the purchaser from her daughter, the mother of the plaintiffs, who was entitled to the inheritance of the estate. This conveyance of the inheritance of the daughter to the mother, for a consideration expressed in it, recites in plain terms,

(*a*) 3 Mac. & G. 683. (*b*) 5 Hare, 39.

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that the transaction was entered into between the mother and daughter, with a view that the sum of 500*l.*, the price purported to be paid by the mother to the daughter for her inheritance, and a further sum of 130*l.*, making together 630*l.*, the trust fund claimed by the bill, should be deposited in the hands of Mr. Wood, the intended purchaser, and should remain in his hands and be held by him, upon trust to pay the interest of it at a definite rate of 4½ per cent. to the grandmother for life, with remainder to the mother of the plaintiffs for life, for her separate use, with remainder to the children, who are the present plaintiffs. This purchase by the mother from the daughter of the inheritance, with the conveyance which contains this recital, was the first step in effecting the sale to Mr. Wood. The conveyance to Mr. Wood by the grandmother, after she had thus purchased the inheritance from the daughter, is proved; and the defendants, who resist the claim to the plaintiffs, rely very much upon the fact, that upon the deed of conveyance from the grandmother, who had thus acquired the fee, to Mr. Wood, the purchaser, there is indorsed a receipt for the 630*l.*, which they say is conclusive against the plaintiffs' case; and conclusive, because although the plaintiffs produce in evidence a deed dated in March, which is referred to as an intended deed in the recital of the deed of February, being the deed declaring expressly the trusts on the part of Mr. Wood, that deed is shewn never to have been executed by him.

The case of the plaintiffs, however, does not rest there; for Mr. Wood, having thus become the purchaser of this estate in the year 1796, and having had it conveyed to him in consideration of this sum of 630*l.*, sold the estate in 1800 to a gentleman of the name of Fox; and in the conveyance by Mr. Wood to Mr. Fox, who purchased from him, there is a recital of the conveyance from the plaintiffs' grandmother to Mr. Wood, as shewing what was Mr. Wood's title. That is a recital of the deed which brings home

to Mr. Wood as part of his title that very instrument which embodies the trust upon which he was to hold the 630*l.* Taking these instruments together, and upon the evidence before me, it is plain that the receipt indorsed for the 630*l.* on the conveyance executed to Mr. Wood—Mr. Wood taking as part of his title the conveyance under the deed of February, 1796—is not evidence to acquit Mr. Wood of this sum of 630*l.* Upon the evidence before me it is impossible to doubt that the money was not paid according to that receipt; for if it had been so paid, Mr. Wood would have lost that which was the great purpose of the recital in the deed of 1796, namely, the indemnity afforded to him by his retaining this trust fund in his hands on account of a supposed incapacity on the part of the daughter Mary Oland who had conveyed the inheritance to her mother. There is the clearest evidence that the purchase by Mr. Wood, who sold to Mr. Fox in the year 1800, was upon the footing of an impression that there was an infirmity of the title in respect of the supposed incapacity of the plaintiffs' mother, which could not be effectually cured until the title was confirmed on the part of those children who are now plaintiffs.

Taking these facts, it seems impossible to doubt that this sum remained in the hands of Mr. Wood; and if it remained in his hands, I must consider that it was impressed with the trust recited under the deed of 1796, which is a part of his title; and that, according to the recital of that deed, this money, until paid by Mr. Wood or by his representatives, was money in which the plaintiffs upon the death of their mother became entitled in possession as cestui que trusts against Mr. Wood, the holder of the fund. The fund is a mere money fund, and not within the operation of the Statute of Frauds as to trusts for land, which requires that the declaration of trust should be in writing. Even if it were within the statute, upon the evidence before me, when there is the execution by Mr. Wood of that deed

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of conveyance of 1800, which expressly refers to the deed of 1796, which recites the trust, it would be difficult to hold that there was not under the hand and seal of Mr. Wood all that the Court requires as a recognition by the trustee of the trusts upon which he held this sum of 630*l.*

When these facts are established, the case is reduced to the simple case of a trust fund in the hands of a trustee claimed by the persons entitled to it in remainder. Mr. Wood died in 1811, having devised his estates to Carpenter, subject to a charge of debts. Mr. Carpenter was not only devisee but also executor. Mr. Carpenter, in the year 1819, which is eight years after the death of Mr. Wood, the trustee, is proved, by the evidence of Mr. Steele, to have been applied to on behalf of the mother, who was the tenant for life of the trust fund: and his conduct materially supports the case of the plaintiffs; for he at once acknowleged the existence of the trust fund, and not only acknowledged the existence of the trust fund, but, he being the executor of Mr. Wood the trustee, acting with perfect honesty and propriety, gave to Mr. Steele, who applied to him on behalf of the plaintiffs' mother, the tenant for life, that very deed of March containing the declaration of trust, which had not been executed by Mr. Wood, the trustee, but which his executor delivered from his custody to the person who claimed to be the cestui que trust. This is a circumstance so strong, that it would relieve the case from any doubt or difficulty with regard to the existence of the trust. Mr. Carpenter lived until the year 1849, and in 1849 the present defendant came into possession of these devised estates of Mr. Wood, which were subjected by Mr. Wood to the payment of his debts.

It is said, however, that this is an extremely stale demand; for, admitting this fund to be a trust fund, and in the hands of and due from the testator Mr. Wood, that, upon Mr. Wood's death in 1811, the primary fund for the payment of this sum, and for satisfying the claim of

the plaintiffs, was his personal estate; and that, if the plaintiffs had applied in time, his personal estate might have been sufficient.

But that is no reason why on their right in remainder coming into possession, they are to be held too late in asserting this demand.

In the case of *Bennett* v. *Colley* (*a*), where there was no express trust, but where the claim of the plaintiffs against the assets of a testator for the loss occasioned to the remaindermen by the testator having failed to renew a leasehold under an ecclesiastical title, the lease had been allowed to expire in 1800, and then the damage, in respect of which the bill was filed, accrued; but the bill was not filed until 1831. It was there argued with great force, that, inasmuch as the person entitled in remainder might have filed a bill in 1800, the fact of his acquiescing for thirty-one years without making any demand, was a reason for the Court refusing its assistance. The effect was said to be, that a double term of grace was to be allowed to a suitor in this Court, the first commencing from the instant when the wrong was committed, and the second from the time when the amount of that wrong became most easily capable of estimation. The Court however held, that the plaintiff was entitled to relief.

In this case one of the terms of the trust was, that the tenant for life had a power of appointment. How can it be said that any one of these plaintiffs, if they had filed a bill before 1845, that is, before the death of the tenant for life, could have stated what his or her exact interest in the trust fund was, while the interest of any one of them was liable to be entirely defeated by an appointment. Therefore, both upon principle and upon the authority of the case of *Bennett* v. *Colley*, I cannot entertain the argu-

(*a*) 2 My. & K. 225.

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ment, that, because a bill might have been filed in 1811, or any time between 1811 and 1845, by the persons entitled in remainder, the plaintiffs are too late when they file this bill within seven years after the death of the tenant for life.

The plaintiffs here seek to recover a trust fund, where the trust is proved, and where it is clear that the devised estates in the hands of these defendants are liable to make good the claim of the plaintiffs; and my opinion therefore is, that the plaintiffs are entitled to a decree in their favour. With reference to the amount of the interest, having regard to all the circumstances, I am not disposed to go further back than the death of the tenant for life; and it must be at the rate stated, that is, four-and-a-quarter per cent. from that date. It is certainly a somewhat arbitrary period to take, but the case is very peculiar, and not free from hardship on the part of these defendants. Therefore, declare the plaintiffs entitled to the sum of 630*l.*, with interest at four-and-a-quarter per cent. from the death of the tenant for life in 1845.

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## ALLEN *v.* WILLIAMS.

*Nov.* 20*th &* 27*th.*

The defendant, a beneficed clerk, having failed to pay to the plaintiff his debt, as ordered by the Court, an attachment was issued against him, to which non est inventus was returned. The ordinary writ of sequestration was then issued, to which it was returned, that the defendant had no lay property; and the Court, on motion, ordered a writ of sequestrari facias de bonis ecclesiasticis to issue, directed to the bishop of the diocese.

THIS was a motion for a writ of fi. fa. de bonis ecclesiasticis, or for a writ of sequestrari facias de bonis ecclesiasticis, against the incumbency of the defendant, directed to the Bishop of Manchester.

On the 17th of April, 1849, by an order made in the cause, the defendant, who was the perpetual curate of Euxton, near Chorley, in the diocese of Manchester, was ordered to pay to the plaintiff a sum of money. The defendant having failed to pay the amount an attachment was obtained against him, to which a return was made by the sergeant-at-arms of non est inventus. Upon this the ordinary writ of sequestration was issued, empowering the commissioners to sequester his goods, chattels, and personal estate. To this the return was made, that the defendant had no lay property, but that he was incumbent of Euxton.

Mr. *F. T. White,* for the motion, cited Tidd's Practice, vol. 2, 3rd ed., pp. 102--3; Tidd's Forms, pp. 72, 74, 75; and also the 10 Vict. c. 110, ss. 13, 18, 19, 20; and Gilbert on Executions, p. 26.

His Honour having asked for some precedent, Mr. Munro, the Registrar, mentioned the case of *Norton* v. *Pritchard* (*a*), decided by the late Vice-Chancellor of

(*a*) Reg. Lib. B. for 1568. The following is a copy of the Order:

"Tuesday, 7th Oct. 1845.

"Whereas, by an order dated the 12th day of June, 1845, it was ordered that the defendants, John Hinxman and William Addington Norton, should, on or before the 1st day of July next, or within fourteen days of the service there of, such service to be verified by affidavit, transfer 541*l.* 5*s.* 5*d.* Bank 3*l.* per Cent. Annuties into the name and with the privity of the Accountant-General, &c.; And it was ordered, that the defendant John Hinxman, the defendant Cecilia Bligh,

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England. His Honour on the authority of that case made the order, but said he desired to express no opinion

and the defendant William Addington Norton, should, on or before the 1st day of July then next, or within fourteen days of the service thereof, such service &c., pay into the Bank with the privity &c., 6139*l.* cash; and the said defendant William Addington Norton not having transferred the said Bank Annuities, or paid the said sum of 6139*l.* as by the said order directed, an attachment issued against the defendant William Addington Norton, directed to the sheriff of Suffolk; and the said sheriff having returned that the said defendant was not found in his bailiwick, and the said defendant William Addington Norton not having transferred the said Bank Annuities or paid the said sum of 6139*l.* by the said order directed, it was thereupon, by an order of the 2nd of August, 1845, ordered, that a commission of sequestration should issue, directed to certain commissioners, to sequestrate the personal estate, and the rents, issues, and profits of the real estate of the defendant William Addington Norton, until he should transfer the said 541*l.* 5*s.* 5*d.* Bank 3*l.* per Cent. Annuities into the name and with the privity &c., and pay into the Bank, with the privity &c., the said sum of 6139*l.* cash, clear his contempt, and this Court make other order to the contrary. And whereas, in pursuance of the said last-mentioned order, a commission of sequestration was issued out of and under the seal of this Court, bearing date the 9th day of August, 1845, directed to Charles Moor, George Moor, and James Benyer, thereby giving full power and authority to them, or any two of them, to enter upon all or any of the messuages, lands, tenements, and real estate whatsoever of the said William Addington Norton; and to collect, receive, and sequester into their hands not only all the rents and profits of the said messuages, lands, tenements, and real estate, but also all his goods, chattels, and personal estate whatsoever; and thereby commanding them, or any two of them, that they should, at certain proper and convenient days and hours, go to and enter upon all the messuages, lands, tenements, and real estate of the said William Addington Norton; and that they should collect, take, and get into their hands, not only the rents and profits of his said real estate, but also all his goods, chattels, and personal estate; and detain and keep the same under sequestration in their hands until the said William Addington Norton should transfer the said 541*l.* 5*s.* 5*d.* Bank 3*l.* per Cent. Annuities into the name and with the privity &c., and pay into the Bank, with the privity &c., the sum of 6139*l.*

as to the effect of it under the statute of the 13 Eliz. c. 20.

cash, clear his contempt, and this Court make other order to the contrary. And whereas, it was by the return of Charles Moor and George Moor, two of the said commissioners of sequestration, dated the 30th of September, 1845, [stated] that the said William Addington Norton has not any messuages, lands, tenements, or real estate, the rents or profits whereof, or any goods, chattels, or personal estates, which they can detain and sequester as commanded by the said commission; and that the said William Addington Norton is a beneficed clerk, to wit, rector of the rectories and parish churches of Eyke and Alderton, in the county of Suffolk, and within the diocese of the Bishop of Norwich, and he still persists in his contempt. Now, upon motion this day made unto this Court by Mr. *Bacon* of counsel for the plaintiff, it was prayed that a sequestration may issue to the Lord Bishop of Norwich, directing him to sequester the livings of Eyke and Alderton, in the county of Suffolk, belonging to the defendant, William Addington Norton; whereupon, and upon hearing the said several orders, the said commission and the returns thereto read, This Court doth order that a commission of sequestration do issue directed to the Lord Bishop of Norwich, commanding him to enter into the rectories and parish churches of Eyke and Alderton, in the county of Suffolk, and take and sequester the same into his possession, and all the rents, tithes, oblations, and obventions, fruits, issues, and profits thereof, and other ecclesiastical goods of the said William Addington Norton in his diocese, and to hold the same in his possession until the said defendant, William Addington Norton, shall transfer the said sum of 541*l.* 5*s.* 5*d.* Bank 3*l.* per Cent. Annuities into the name and with the privity &c., and pay into the Bank with the privity &c., the sum of 6139*l.* cash, clear his contempt, and this Court make other order to the contrary." C. M.

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*April 27th, June 6th & 7th.*

## MOSS *v.* HARTER.

By a voluntary settlement in 1848, a settlor transferred a debt to a trustee in trust for such persons and purposes as the settlor should by any deed or instrument in writing appoint, and in default to pay the income to the settlor for his life, and on his death to distribute the amount amongst specified persons. He afterwards executed an appointment by deed of part of the fund, and confirmed the trusts of the settlement as to the remainder. By his will, made in 1852, the settlor gave certain legacies, and then gave "all his personal estate not otherwise effectually disposed of" to trustees:- *Held*, first, that the settlor had sufficiently expressed his intention not to affect the unappointed property comprised in the settlement of 1848: and secondly, that, even if no such intention appeared, the Wills Act (7 Will. 4 & 1 Vict. c. 26, s. 27) applied only to cases where the power of appointment was equivalent to absolute property.

*Semble*, that the power of appointment contained in the deed did not authorise an appointment by will.

It is not the duty of the Court to strain the words of a power of appointment, in order to bring them within the 27th section of the Wills Act, but to ascertain whether the power is in the widest and most general terms.

IN this suit the plaintiffs, a Mr. Moss and other members of his family, and other persons, claimed to be entitled beneficially, under the trusts of a voluntary settlement, to monies in default of any appointment by the settlor by his will.

The questions raised involved the construction of the 27th section of the Wills Act (*a*).

By an indenture, dated the 30th of March, 1848, and made between Gilbert Winter, deceased, of the one part, and Joseph Winter of the other part (being the voluntary settlement above referred to), reciting that the said John Moss was

(*a*) By 7 Will. 4 & 1 Vict. c. 26, s. 27 (The Wills Act) it is enacted as follows:—"And be it further enacted, that a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

indebted to the said Gilbert Winter in the sum of 15,000*l.*, which the said Gilbert Winter was desirous of settling upon the trusts thereinafter mentioned; the said principal sum of 15,000*l.* and interest were assigned by the said Gilbert Winter to the said Joseph Winter, in trust, for such person or persons, in such shares, and upon such trusts and for such intents and purposes and in such manner as the said Gilbert Winter should at any time or times thereafter and from time to time by any deed or deeds, instrument or instruments in writing, to be by him legally executed, direct or appoint; and in default of such direction or appointment, and so far as any such if incomplete should not extend, upon trust to permit the said trust monies to remain upon their then present state of investment, or to invest the same, with power to vary the securities with the consent of the said Gilbert Winter during his lifetime, and to pay the interest, dividends, and annual proceeds of the same to the said Gilbert Winter and his assigns during his life; and after his death to collect and get in the said sum of 15,000*l.*, giving to the said John Moss, his executors or administrators (in case the same or any part thereof should remain in his hands) twelve months notice to pay in the same, and to pay the same to the said John Moss and various members of his family, and other persons, in the shares and manner in the said deed mentioned; and as to all the residue of the said trust monies and premises, in trust for the said Joseph Winter absolutely. The indenture contained the usual powers of maintenance during the minorities of the cestuis que trust, and the usual trustee clauses.

Gilbert Winter afterwards executed a deed poll under his hand and seal, dated the 30th of October, 1851, and he thereby,—after reciting the indenture of the 30th of March, 1848, in execution of the trust, power, or authority in the said indenture contained, and of all powers or authorities enabling him in that behalf—made certain directions and

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appointments in the deed poll contained as to the time and mode of payment of one of the shares, and as to the disposition of two other shares; and he thereby directed Mr. Joseph Winter, the trustee, out of a competent part of the residuary trust monies, to pay an annuity of 100*l.* to one Richard Wood for his life. In all other respects he confirmed the above indenture. In a letter, addressed by the testator Gilbert Winter to Mr. Wood, dated the 12th of January, 1852, the former informed the latter of the gift to him of the annuity.

Joseph Winter, the trustee, died in 1852.

Mr. Gilbert Winter, the settlor of the indenture of the 30th of March, 1848, duly made his will, dated the 2nd of August, 1852, and thereby, after directing all his just debts, funeral and testamentary expenses, to be paid, he bequeathed to Thomas Edward Moss and James Collier Harter, their executors and administrators, all monies owing to him from the London and North Western Railway Company, and all interest due or to grow due in respect of the same, upon the same trusts as the same ought to be held if they were monies arisen from a sale of his real estate in his will devised upon trusts for sale; and after giving a legacy of 200*l.* to the said James Collier Harter, he bequeathed all his personal estate "not otherwise effectually disposed of" to his said trustees, upon trusts for the benefit of the several persons in his said will mentioned; with a trust as to the residue of his estate and effects for several persons in the will named, being persons other than those entitled under the trusts of the indenture of the 30th of March, 1848. The testator appointed Mr. Thomas Edward Moss and James Collier Harter executors of his will.

By a codicil, dated the 9th of August, 1852, Mr. Gilbert Winter, the testator, appointed a Mr. Daintry to be an additional trustee and executor; and by a second codicil, dated the 13th of January, 1853, he varied some of the trusts in his will, and revoked the appointment of

Thomas Edward Moss as trustee and executor, and appointed a Mr. Cunliffe in his place.

On the same 13th of January, 1853, Mr. Gilbert Winter executed a deed under his hand and seal, indorsed on the deed poll of the 30th of October, 1851, and he thereby, in pursuance and in exercise and execution of the trust, power, and authority in the therein within recited indenture contained further varied the trusts in the said deed poll contained in one particular. The above-mentioned codicils and the last-mentioned deed were prepared by different solicitors.

Mr. Gilbert Winter made a third codicil to his will, dated the 14th of February, 1853, by which he gave certain chattels, and in all other respects confirmed his will.

Neither the will nor any of the codicils referred in any manner to the voluntary settlement of the 30th of March, 1848, or expressly purported to exercise the power contained in that settlement or any powers generally.

Mr. Gilbert Winter died on the 15th of February, 1853, and his will and codicils were proved by Messrs. Harter, Daintry, and Cunliffe.

The testator on various occasions in his lifetime made reference to the provisions contained in the voluntary settlement of 1848; and particularly, on the 8th of February, 1853, only seven days before his death, when dining with Mr. Moss and his family, he referred to the various trusts contained in that settlement, and stated his reasons for the dispositions he had made of his property.

The suit was by several members of the Moss family and the persons entitled under the trusts of the voluntary settlement against the executors and the several persons interested under the will, one of whom was named Moss, and was interested both under the deed and the will.

The plaintiffs prayed for a declaration by the Court, that the will and codicils of the testator, Gilbert Winter, did not operate as an execution of the power of appointment given

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to him by the voluntary settlement of the 30th of March, 1848.

The bill also raised a case of circumstances tending to prove that Mr. Winter had intended that the settlement should reserve to him a power of appointment by deed and not by will, and contained a prayer, that, if necessary, the settlement might be reformed by confirming the power of appointment to be by deed only; but this part of the plaintiffs' case became unnecessary.

The cause came on and was part heard on the 27th of April, 1854, but stood over.

The cause was now brought on for hearing.

*Argument.*

Mr. *Walker* and Mr. *J. V. Prior* for the plaintiffs.—The power reserved to Mr. Winter, the settlor in the voluntary settlement, did not authorise a disposition by will —the power is to be exercised by a deed or instrument by Mr. Winter—"by him legally executed." These words are not properly applicable to a will, and the words of the power on their whole construction do not include a will: *Edwards* v. *Edwards* (*a*).

It is a rule, that, on the construction of a will, you may look at the circumstances of the case so as to interpret its meaning: *Smith* v. *Doe* d. *Earl Jersey* (*b*). The circumstances clearly shew that the testator never intended by his will and its codicils to interfere with the trusts of the deed; for, on the same day on which he made the codicil to his will, of the 13th of January, 1850, he by deed varied the trusts of the settlement in a way altogether inconsistent with the intention of disposing of the fund by his will. Moreover, the words of the will give the testator's personal estate "not otherwise effectually disposed of." On this form of disposition

(*a*) 3 Mad. 197.

(*b*) 3 Bligh. 290, 394; *S. C.*, 1 B. & B. 97; 2 Id. 473; 7 Price, 281; 5 M. & Sel. 467.

two observations arise: 1st, that the monies comprised in the settlement could not properly be called the testator's personal estate; and 2ndly, that the monies so comprised were "effectually disposed of" by the deed.

Mr. *Bacon* and Mr. *Selwyn* for Mr. John Moss, one of the defendants who was in the same interest with the plaintiffs, cited *Collard* v. *Sampson* (*a*), and relied on the distinction taken in that case by Lord Justice *Turner* between a power to appoint by deed or writing, and a power to appoint by deed or will.—They also cited *West* v. *Ray* (*b*), in which the Vice-Chancellor *Wood* held, that a power of appointment to be exercised under the hand and seal of the trustee could not be exercised by will.

Mr. *Malins* and Mr. *Osborne* for the defendants entitled solely under the will.—The will is "legally executed," and it is an "instrument in writing," and comes within the precise terms of the description of the document by which the power was to be exercised.

Lord *St. Leonards*, in his Treatise on Powers (*c*), says, the Court will take advantage of words of a general comprehensive sense, as "writing," or "instrument," and deem a will to be within the meaning of the power; and his Lordship establishes this proposition by the cases which he has collected from *Kibbett* v. *Lee* (*d*) downwards. A will, then, being within the power, this will operated as an execution of the power. The terms of the 27th section of the Wills Act (*e*) are sufficiently large to make this will to operate as an effectual execution of the power. The testator had a general power of appointment over the funds comprised in the voluntary settlement within the meaning of that section; and the words "not otherwise disposed of," meant not otherwise disposed of by the will.

The simple question is, whether this will was an execu-

(*a*) 4 De G., Mac. & G. 224.
(*b*) Kay, 385.
(*c*) 1 Sugd. Pow. 62, 7th edit.
(*d*) Hob. 312.
(*e*) See ante, p. 458, note (*a*).

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tion of the power reserved to the settlor by the voluntary settlement.

*Argument.*

Mr. *Amphlett* for other defendants.

The case was also argued on the question, whether, if the will was an effectual execution of the power, the plaintiffs were entitled to have the deed reformed. But it became unnecessary for the Court to refer to that question.

*Judgment.*

At the conclusion of the argument, the VICE-CHANCELLOR said:—

This case depends upon the construction of the 27th section of the Wills Act. I am glad to take a view of the case which relieves it from the embarrassments which that Act may produce in other cases.

Where there is a power given by deed to dispose of property by executing an appointment, the law always requires evidence of an intention to execute the power, in order to make any alleged appointment under the power effectual as a valid appointment.

But the statute has in the 27th section altered the law in this respect, and has said, that, where there is a general power of appointment, a general disposition of property by will shall be held to be an execution of that power and to pass the property, unless a contrary intention appears by the will. That enactment supplies an intention, and construes a will as an appointment, unless the will itself declares a contrary intention. In the present case it appears to me upon the face of the will, that the testator did not intend by this will to touch the property which was comprised in the voluntary settlement of 1848. The deed of 1848 stamped a trust upon the 15,000*l.*; and that trust distinctly makes the deed of 1848 itself, if no other deed or will had ever been executed by the testator, a complete disposition of the whole sum of 15,000*l.* It is certain, that, in execution of the power of appointment, the testator did execute two instruments in writing, by which he dealt with

that power in this remarkable way: that in each of these instruments, which were executions of the power, he refers to the trusts created by the deed of 1848 in default of appointment as to the trusts subject to which he intended the property to remain, except so far as he had altered them by these appointments. He has mentioned in these instruments of appointment the trusts in default of appointment in such a way as to make them in truth to be the trusts for the distribution of the property. That being so, there being a deed creating a power, and with trusts declared in default of execution of the power, and two instruments which to a certain extent executed the power, the question is, whether the 27th section of the Wills Act makes a general disposition of the residue of the personal estate, a disposition of so much of the property comprised in the deed of 1848 as remained unappointed.

The testator says very plainly, that, in dealing with his property by his will, he does not intend to deal with any property "otherwise effectually disposed of." That language is as clear and distinct as language can be. It has been, however, contended that these words "not otherwise effectually disposed of" are to be read as "not otherwise by this will effectually disposed of,"—a construction which would violate the express language of the will, which shews an intention not to touch what was "otherwise effectually disposed of." There was an effectual disposition by the deed of 1848, and by the other instruments; and therefore there is an express intention not to interfere with the property remaining unappointed, which was subject to the trusts of the deed of 1848.

The words of the statute are very remarkable, and, I think, deserve great attention from the extensive application which they are likely to have. The words seem to apply only to a case where the testator has power to appoint in any manner he may think proper. It is difficult to conceive more extensive language than that, and, in my view, it is extremely difficult to apply that language to ordinary powers of appointment.

1854.
Moss
v.
Harter.
Judgment.

It was probably the intention of the Legislature that the enactment should only apply to cases like *Cox* v. *Chamberlain* (*a*), where the power of appointment was in such ample terms as to amount to absolute property. The other words of the clause are consistent with that view. They are, that the bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate which the testator may have power to appoint in any manner that he may think proper.

There is a careful expression by the testator that he is not disposing generally of all his personal property, and that he excepts such personal property as he has otherwise effectually disposed of.

This view of the case makes it quite unnecessary to enter into the other questions which have been argued.

I must declare that the 15,000*l.* is governed by the trusts of the deed of 1848, and of the two other deeds, and is unaffected by the will.

(*a*) 4 Ves. 631.

## Ex parte BEDDOES,
## In the Matter of THE SHREWSBURY AND HEREFORD RAILWAY ACT, 1846.

The costs of investing money paid in by a railway company as the price of land taken under their Act, (in redemption of the land tax on other parts of the same property): *Held* payable by the company, although not mentioned specifically in sect. 80 of the Lands Clauses Consolidation Act.

THE Shrewsbury and Hereford Railway Company having taken certain land, which was part of other land in settlement, on the 24th of November, 1854, an order was made, that a part of the purchase-money should be laid out in the redemption of the land tax on other portions of the settled property, and the residue in the purchase of land to be settled to the same uses, and that the company should pay the costs. The order was drawn up including the costs of redeeming the land tax.

Re L B & C. R C. 18 Beav. 608.

A doubt was raised in the Registrar's office, whether, under section 80 of the Lands Clauses Consolidation Act, the costs of reinvesting the purchase money of land taken by the company in redeeming the land tax were costs properly payable by the company (*a*).

(*a*) By 8 Vict. c. 18, s. 69, it is enacted that "If the purchase money or compensation which shall be payable in respect of any lands, or any interest therein, purchased or taken by the promoters of the undertaking from any corporation, tenant for life or in tail, married woman seised in her own right or entitled to dower, guardian, committee of lunatic or idiot, trustee, executor or administrator, or person having a partial or qualified interest only in such lands, and not entitled to sell or convey the same except under the provisions of this or the special Act, or the compensation to be paid for any permanent damage to any such lands, amount to or exceed the sum of 200*l.*, the same shall be paid into the Bank, in the name and with the privity of the Accountant-General of the Court of Chancery in England if the same relate to lands in England or Wales, or the Accountant-General of the Court of Exchequer in Ireland if the same relate to lands in Ireland, to be placed to the account there of such Accountant-General, ex parte the promoters of the undertaking (describing them by their proper name), in the matter of the special Act (citing it), pursuant to the method prescribed by any Act for the time being in force for regulating monies paid into the said Courts; and such monies shall remain so deposited until the same be applied to some one or more of the following purposes; (that is to say,)—In the purchase or redemption of the land tax, or the discharge of any debt or incumbrance affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith to the same or the like uses, trusts, or purposes; or—In the purchase of other lands to be conveyed, limited, and settled upon the like uses, trusts, and purposes, and in the same manner as the lands in respect of which such money shall have been paid stood settled; or—If such money shall be paid in respect of any buildings taken under the authority of this or the special Act, or injured by the proximity of the works, in removing or replacing such buildings, or substituting others in their stead, in such manner as the Court of Chancery shall direct; or—In payment to any party becoming absolutely entitled to such money."

Sect. 80. "In all cases of monies deposited in the Bank under the provisions of this or the special Act, or an Act incorporated therewith, except where such monies shall have been so deposited by reason of the wilful refusal of any party entitled

1854.

*Ex parte* BEDDOES, *In re* THE SHREWSBURY AND HEREFORD RAILWAY ACT.

Mr. *Faber* now submitted, that the company were bound to pay the costs of investing a part of the purchase money in the redemption of the land tax. It was true, that the redemption of the land tax was not one of the purposes specifically mentioned in sect. 80, the costs of which it was enacted the company should pay; but in section 69 the redemption of the land tax was one of the objects in which the money paid in by railway companies might be invested. It was obvious, therefore, that it was the intention of the Legislature, that, where a railway company took a part of land in settlement, on which the land tax was not redeemed, this Court should have the power to employ the funds raised by such sale to the company in redeeming the land tax on the settled property, as being most beneficial to the land-

thereto to receive the same, or to convey or release the lands in respect whereof the same shall be payable, or by reason of the wilful neglect of any party to make out a good title to the land required, it shall be lawful for the Court of Chancery in England or the Court of Exchequer in Ireland to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking; (that is to say,) the costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof, other than such costs as are herein otherwise provided for, and the costs of the investment of such monies in government or real securities, and of the reinvestment thereof in the purchase of other lands, and also the costs of obtaining the proper orders for any of the purposes aforesaid, and of the orders for the payment of the dividends and interest of the securities upon which such monies shall be invested, and for the payment out of Court of the principal of such monies, or of the securities whereon the same shall be invested, and of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants: Provided always, that the costs of one application only for reinvestment in land shall be allowed, unless it shall appear to the Court of Chancery in England, or the Court of Exchequer in Ireland, that it is for the benefit of the parties interested in the said monies that the same should be invested in the purchase of lands, in different sums and at different times, in which case it shall be lawful for the Court, if it think fit, to order the costs of any such investments to be paid by the promoters of the undertaking."

owner; and, if so, the costs would seem to follow as a matter of course.—He cited *Ex parte Trafford* (*a*).

See also *Ex parte Eton College, &c.* (*b*), *Ex parte Trustees of Adey's Charity* (*c*).

The VICE-CHANCELLOR made the order.

1854.

*Ex parte* BEDDOES *In re* THE SHREWSBURY AND HEREFORD RAILWAY ACT.

(*a*) 2 Y. & Coll. 522. (*b*) 3 Railw. Cas. 271. (*c*) 3 Hare, 22.

## SIMPSON *v.* SADD.

1854.
*June 27th.*

Under an agreement for a lease the intended lessee took possession immediately and before the day fixed by the agreement, which contained no stipulation as to the delivery of an abstract of the lessor's title, and no abstract was called for until after the intended lessee had been four months in possession, and advertised the property to be let as his own: —*Held*, that the right to investigate the lessor's title was waived and lost.

Distinction drawn between cases in which the times for taking possession and delivering the abstract of the title are both fixed by the contract, and a case where the time of taking possession only is fixed.

THIS was a special claim, seeking to enforce specific performance of a contract to take leases of two houses and warehouses. The only question was, whether the defendant had a right to inspect the lessor's title, or, if he ever had such a right, whether he had waived it.

It appeared that the plaintiff (who was possessed of Nos. 16 and 17 Lisle-street, Leicester-square, and warehouses attached,) and the defendant entered into and signed the following agreement:—

"Memorandum of agreement made this 12th day of November, 1853, between Miles Simpson and George Sadd; whereby the former agrees to grant, and the latter agrees to accept, a lease of No. 16, Lisle-street, from Christmas next, at the annual rent of 85*l.* 6*s.* 6*d.*, payable quarterly, for the term of twelve years and three quarters less fourteen days.

"The said Miles Simpson also agrees to grant, and the said George Sadd to accept, a lease of No. 17, Lisle-street, from Christmas next, at the annual rent of 134*l.* 13*s.* 4*d.*, payable quarterly, for the term of sixteen years less fourteen days. Both such leases to contain the same covenants

1854.

SIMPSON v. SADD.

*Statement.*

and clauses, so far as applicable, as are contained in the leases under which the same are now held.

"The said George Sadd to have possession, on the 21st of November instant, of all the warehouses on the ground floors; also the possession of the upper part of No. 17, (now occupied by Mr. Williams,) on or before Christmas next, or so soon as the said Miles Simpson can get him out; which he engages to do as soon as by due diligence he can do so. The present tenant of the upper part of No. 16 to be adopted, or otherwise, by George Sadd, after next Christmas, and such tenant is to pay Miles Simpson the rent for the same to next Christmas; George Sadd to pay rent only from Christmas next. All outgoings up to that time to be paid by Miles Simpson. The tenants' fixtures of every description, for trade and otherwise, in the said two houses, to be now valued in the usual way, and paid for by George Sadd. The amount of them to be added to the sum for which Miles Simpson is to draw bills on George Sadd for goods now purchased of him by the latter, and to be included in such bills. The expenses of such valuation to be paid equally by both parties. The said two leases and counterparts thereof to be prepared by the solicitors of Miles Simpson, and paid for by George Sadd."

The defendant took possession of the warehouses, part of the premises agreed to be demised, on the 12th of November, 1853.

The plaintiff's solicitors wrote a letter to the defendant on the 21st of November, 1853, in the following terms:—

"We understand that Mr. Williams leaves No. 17. this morning, so that you can at once have possession of the part he occupied as well as the warehouses which you entered upon last week*. We are proceeding to prepare the leases, and Mr. Green will meet your valuer as to the fixtures."

* *Sic.*

The defendant, on receipt of this letter of the 21st of

November, 1853, took possession of the parts of the premises whereof he had not previously taken possession.

The defendant, on the 25th of November, 1853, wrote to the plaintiffs solicitors a letter, as follows:—

"I shall be much obliged if you will defer the preparation of the leases of the Lisle-street premises, as I have a prospect of finding a partner in that matter who, I think, should be included therein."

The plaintiff's solicitors prepared drafts of the proposed leases, and sent them to the defendant for his perusal on the 10th of December, 1853; and on the 18th of January, 1854, they wrote to the defendant requesting him to return such drafts approved. To this letter the plaintiff's solicitors received an answer, dated from Cambridge, to the following purport:—

"In reply to yours received this morning, I shall return to London on Monday, and will get Mr. Huson to examine the drafts of the leases for me, and again communicate with you as soon as I can."

After frequent applications made to the defendant, his solicitor wrote a letter, dated the 16th of March, 1854, to the plaintiff's solicitors, in the terms following:—

"On behalf of Mr. George Sadd, I request that you will furnish me, without delay, with abstracts of your client's Mr. Miles Simpson's title to Nos. 16 and 17 Lisle-street, in order that I may ascertain whether he has a good title to the premises in question."

This request for an abstract of the plaintiff's title was then made for the first time.

The plaintiff's solicitors, in reply, denied the defendant's right to require the plaintiff's title to be produced, and requested the performance of the contract forthwith.

1854.

SIMPSON v. SADD.

*Statement.*

A correspondence ensued; and a demand was then made on the part of the plaintiff for the payment of 160*l.* 11*s.*, being the amount of the valuation, by the valuers of both parties, of the fixtures taken possession of by the defendant in November, 1853, of which the payment had been postponed from the 2nd of December, 1853, at the request of the defendant.

On the 30th of March a notice was served by the defendant on the plaintiff, that it was the defendant's intention to give up possession of the premises on the following day, at twelve o'clock.

On that day the defendant's solicitor returned the draft of the proposed lease to the plaintiff's solicitors, but the plaintiff did not take possession of the premises.

The plaintiff, by his claim, insisted, that if the defendant ever had a right to investigate the plaintiff's title he had waived such right, and asked for a decree for specific performance on that footing.

It appeared, by the affidavits filed on behalf of the plaintiff, that the defendant had, subsequent to his taking possession of the premises, adopted the occupier of the upper part of No. 16, Lisle-street as his tenant;—that he had by advertisement in the Times newspaper, on the 8th of December, 1853, announced that the premises Nos. 16 and 17, Lisle-street, were to be let, with immediate possession, with the fixtures;—that he had been assessed to and had paid rates and taxes in respect of the premises, and that he had otherwise acted as tenant in possession.

*Argument.*

Mr. *Malins* and Mr. *Walford* for the plaintiff, submitted, that the defendant, having entered into possession of the premises without having asked for an abstract, and having in every respect as tenant in possession continued in such possession from November, 1853, until March, 1854, must be taken to have waived all right to investigate the lessor's title, and that specific performance must be decreed on that footing.

They cited *Warren* v. *Richardson* (*a*).

1854.

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*Argument.*

Mr. *Craig* and Mr. *Morris* for the defendant.—The general rule is, that a person who has agreed to become a purchaser or lessee, has, where nothing is said or done to the contrary, a right to require the production of his vendor's or lessor's title. There has been no distinction between the right of the latter and that of the former since *Fildes* v. *Hooker* (*b*), which decided, that even a lessee for a short term at rack rent is entitled to investigate his lessor's title. The title of the original lessor, as well as of the immediate lessor, must be shewn: *Souter* v. *Drake* (*c*). But this contract was substantially an agreement for the assignment of the estate of the vendor, the form of the instrument—an underlease—being adopted, the better to secure to the plaintiff the increased rent which was taken in lieu of a price paid down. It is laid down by Lord *St. Leonards* (*d*), that, "if possession is authorised by the contract to be taken before a title is made, the fact of possession cannot by itself be used against the purchaser, for that would be contrary to the very terms of the contract;" and the cases cited fully sustain that proposition. Here possession was taken, as authorised by the contract; and the mere taking and continuing possession has not disentitled the defendant to require the plaintiff's title. Now, if possession has been lawfully taken, acts of ownership do not destroy the right to require the plaintiff's title, even where the acts are injurious to the inheritance. This is in accordance with what Lord *St. Leonards* says (*e*), and is supported by *Burroughs* v. *Oakley* (*f*), *Osborne* v. *Harvey* (*g*), and the other cases cited in Lord *St. Leonards'* work. The acts which the plaintiff proves against the defendant were merely consequential to the ownership acquired by the possession which had been

(*a*) Younge, 1.
(*b*) 2 Mer. 424.
(*c*) 5 B. & Ad. 992.
(*d*) 1 Sugd. V. & P. 400. (11th ed.)
(*e*) 1 Sugd. V. & P. 401.
(*f*) 3 Swanst. 159.
(*g*) 1 Y. & C. C. C. 116.

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SIMPSON v. SADD.

*Argument.*

authorised.—They also cited *Knatchbull* v. *Grueber* (*a*), and *The Margravine of Anspach* v. *Noel* (*b*).

The plaintiff's counsel were not called on to reply.

*Judgment.*

The VICE-CHANCELLOR said:—

The plaintiff insists, that, if the defendant had at the time when the agreement was entered into a right to call for an investigation of the title, it has been lost by the subsequent conduct of the defendant. In the case of an ordinary agreement to take a lease of or to buy an estate, if the purchaser takes possession without calling for an abstract of the title, his taking possession is a waiver of his right to make objections to the title. But it generally happens, that there are in the agreement stipulations as to the time for taking possession, and for the delivery of an abstract. If the time fixed for taking possession is antecedent to the time fixed for the delivery of the abstract, it would be absurd to hold that the taking possession is a waiver of the right to investigate the title; for it would be inconsistent with the terms of the contract, and in such a case the ordinary rule would be excluded by the special terms in the agreement.

In the present case there is no time fixed for delivering the abstract of title, nor for investigating it. But the time fixed for taking possession of the premises was at the end of nine days from the date of the agreement. Possession was taken before that time; but, when possession was taken, nothing was said about delivering the abstract or the investigation of the title. A case of this kind cannot be governed by the decisions in cases where the periods have been fixed for both purposes.

The possession having been taken previously to the time fixed by the contract, it can scarcely be right to allow the defendant now to say that he ought not to be bound to take the leases from the plaintiff, unless the plaintiff first shewed him a good title to the houses.

(*a*) 3 Mer. 124. (*b*) 1 Madd. 310.

1854.

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*Judgment.*

There is no stipulation in the agreement as to title; and it is plain to my mind, from the whole conduct of the defendant, that when he entered into the agreement he had no wish to investigate the title, and the notion of looking into the plaintiff's title seems a mere device of his solicitor. The defendant had possession of the property, not according to the strict terms of the contract, but on the very day on which the contract was signed. No doubt the time between the date of the agreement and the period at which it was stipulated possession should be taken, was short; but within that time the defendant had a right to ask for the production of an abstract of the plaintiff's title, and might have satisfied himself as to its validity. When, after taking possession, the defendant was asked to approve of the drafts, he applied to the plaintiff to defer the preparation of the leases, not in order to give him an opportunity to investigate the plaintiff's title, but because the defendant hoped to find a partner who he thought should be a co-lessee. That circumstance alone would make it very difficult for the defendant to say that he had not waived all right to investigate the title. But the case goes much further, for the defendant afterwards advertised the premises to be let by himself upon his own account; and he did not, until some time afterwards, demand, as it appears, for the first time, an abstract of the plaintiff's title. The demand was made, in order to avoid the completion of the contract. By this conduct of the defendant he lost his right to investigate the plaintiff's title.

The decree was for the specific performance of the agreement, the drafts of the leases to be settled by one of the Conveyancing Counsel of the Court, in case the parties should differ; the defendant to pay the costs.

The decree contained a declaration of the right of the plaintiff to recover the rent due from Christmas to Lady-day, and the amount of the valuation of the fixtures, and ordered those amounts to be paid within one month.

On appeal, 4 De Gex M & G. 665.

1854.

*June 28th.*

## GOLDS *v.* GREENFIELD.

A debtor, by deed, assigned his effects for the benefit of his creditors, who thereby covenanted not to sue him. One of these creditors, by will, gave the residue of his estate among six persons, and directed that such of them as should be indebted to him at his decease should accept the debt as part of his share. One of these persons was the debtor:—*Held*, that the debt was satisfied by the assignment and the testator's covenant not to sue; and that the executors were bound to pay to the debtor his full share of the residue.

THIS was a special case.

By an indenture, dated the 31st of May, 1850, and made between the plaintiff of the first part,—John Killick (the testator in the cause, since deceased), Thomas Grant, and Thomas Golds, who were creditors of the plaintiff, of the second part; and the several other persons, parties thereto, being other creditors of the plaintiff, of the third part,—the plaintiff conveyed and assigned his real and personal property to Messrs. Killick, Grant, and Golds, upon trust, for conversion, and thereout to pay the debts due to themselves, Messrs. Killick, Grant, and Golds, and to the other creditors of the plaintiff, parties thereto, of the third part, or so much of such debts as the proceeds would be sufficient to pay rateably among them. And, in consideration thereof, the parties thereto of the second and third parts severally and respectively covenanted with the plaintiff, that they the said parties thereto of the second and third parts would not at any time thereafter commence or prosecute any actions or suits at law or in equity against the plaintiff, his heirs, executors, or administrators, or attach his or their estate or effects for any debt then owing by the plaintiff to them; and in case any of the parties thereto of the second and third parts, or their respective heirs, executors, administrators, or assigns, should commence any such action, suit, or attachment, that then the plaintiff, his heirs, executors, or administrators might plead that indenture as a general release in bar.

Mr. Killick was, at the time of the execution of the indenture, a creditor of the plaintiff in the sum of 308*l.*, on a promissory note, dated the 18th of April, 1850, made by the plaintiff; and he was also the surety of the plaintiff, to pay 100*l.* upon a promissory note by the plaintiff and himself to one Joseph Holloway.

Mr. Killick, by his will, dated the 25th of June, 1850, after bequeathing several legacies, gave all his real and the residue of his personal estate to the defendants Michael Greenfield, Richard Woolven, and Richard Holloway, upon trust, to convert the same, and out of the proceeds to pay one-sixth part to the plaintiff, and to dispose of the remaining five-sixth parts as in the will expressed. The will contained a declaration, in the following words: "My will and mind further is, and I do hereby direct, that such of my legatees as may be found indebted to me at the time of my decease in any sum or sums of money, either upon bond, note of hand, book debt, or otherwise howsoever, and also such sum or sums of money which I or my heirs, executors, or administrators shall pay, or be bound or liable to pay on their account, or on account of their respective parents, that sum or sums of money shall be considered and accepted by him, her, or them, as part of his, her, or their share or shares of and in my estate and effects."

The testator died in December, 1850; and the defendants Greenfield, Woolven, and Holloway, the executors named in the will, duly proved the same shortly afterwards.

The promissory note for 308*l.* of the plaintiff to Mr. Killick was found among the testator's papers.

The defendants, as the executors of the testator, received from the trustees of the deed of May, 1850, 107*l.* 16*s.*, being a dividend of 7*s.* in the pound on the sum of 308*l.*; and they paid to the said Joseph Holloway 75*l.* 15*s.*, being the residue unpaid by the plaintiff of the sum of 100*l.*, for which the plaintiff and the testator, as his surety, had given their promissory note as above stated.

The defendants had in their hands the clear residue of the testator's real and personal estate, and they had deducted from the one-sixth part or share thereof, to which the plaintiff was entitled, the sum of 75*l.* 5*s.* so paid by them to Joseph Holloway. The plaintiff did not object to this being done.

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GOLDS v. GREENFIELD.

*Statement.*

But the question submitted for the opinion of the Court was, whether the defendants were entitled also to deduct the sum of 200*l.* 4*s.*, being the difference between the 308*l.* which was due from the plaintiff to the testator at the date of the deed of 1850, and the 107*l.* 16*s.*, which the defendants had received as a dividend payable under that deed.

*Argument.*

Mr. *Selwyn* for the plaintiff.

Mr. *Craig* and Mr. *Waller* for the defendants.—A covenant not to sue is not equivalent to a release; it takes away some of the covenantor's remedies, but does not destroy the debt, which remains a debt due to the creditor. At the highest, it operates in favour of the debtor in a way similar to the Statute of Limitations. Now that statute is no answer to a claim by an executor to set off a debt barred by the statute against a legacy given by a testator: *Courtenay* v. *Williams* (*a*), *Rose* v. *Gould* (*b*), *Ford* v. *Beech* (*c*), *Gibbons* v. *Vouillon* (*d*); and the debt so barred may be set off. So this debt may be set off against the plaintiff's share of residue..

The object of such a covenant as that which the testator entered into with the plaintiff in the deed of 1850 was to protect him from personal inconvenience. If an absolute release had been intended to be given by the testator to the plaintiff, a release would have been inserted in the deed. Such deeds as these are not to be strained beyond their obviously expressed intention: *Squire* v. *Ford* (*e*).

On the whole construction of the deed of 1850 an absolute release is not to be intended, and the plaintiff must be held to have continued indebted to the testator at the time of his decease within the meaning of the proviso contained in the testator's will; and the amount of such debt ought to

(*a*) 3 Hare, 539.
(*b*) 15 Beav. 189.
(*c*) 11 Q. B. 842.
(*d*) 8 C. B. 483.
(*e*) 9 Hare, 47.

be deducted from the plaintiff's share of residue.—*Bell* v. *Bell* (*a*) was also referred to.

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GOLDS
*v.*
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*Judgment.*

The VICE-CHANCELLOR:—

By the contract, the testator accepted whatever he might get under the deed so entirely in full satisfaction of his debt, that he covenanted not to sue for it. I think that the testator after his covenant not to sue the plaintiff, and after agreeing to accept a dividend under the assignment, has, in fact, bound himself not to treat this plaintiff as indebted to him.

As to the sum of 308*l.*, my opinion is, that it was satisfied by the deed; and I must declare that the executors are not entitled to deduct the sum of 200*l.* 4*s.* out of the plaintiff's share of the residue of the testator's property.

(*a*) 17 Sim. 127.

Astle v Wright 23 Beav. 77.
Patterson v Slaughter 23 Beav. 430 2

1852.
*Jan.* 12*th.*
1854.
*June* 27*th.*

## FREELAND *v.* STANSFELD.

Two surgeons, in consideration of 900*l.* paid by one to the other, entered into partnership for seven years. Before the expiration of a year and a half, the partner who had received the 900*l.* became bankrupt. On a bill by the solvent partner against the bankrupt's assignee:—*Held*, that the consideration for which the 900*l.* had been paid having failed, the plaintiff was entitled to an allowance of a sum proportionate to the period of the partnership which remained, with a lien for that amount on the partnership assets.

Notwithstanding the Bankrupt Act, 1849, sect. 152, a receiver was appointed on the motion of the solvent partner.

*Semble*,—that an assignee of a bankrupt partner, who, by giving notice to the debtors to the partnership, prevents the payment of the debts to the solvent partner, who is answerable for the partnership debts, and thus gives occasion to a suit by the solvent partner, is liable to the costs of the suit.

THE sole plaintiff in this suit was Mr. Freeland. The only defendants were Messrs. Stansfeld, Adams, and Cotterell, the assignees of Mr. Leech. Messrs. Leech and Freeland were surgeons, in partnership, at Chichester, from the 1st of January, 1850, till June, 1851, when Mr. Leech became bankrupt. The only question in the cause was,

Atwood v Maude L.R. 3 Ch. App. 369.

1852.

FREELAND v. STANSFELD.

*Statement.*

whether Mr. Freeland was entitled to have any and what portion of a premium of 900*l.*, which he had paid to Mr. Leech on entering into the partnership, allowed to him, as a charge on the assets in taking the account of the partnership transactions.

In an indenture, dated the 1st of January, 1850, and made between Edward Leech, who afterwards became bankrupt, of the one part, and the plaintiff Frederick John Freeland of the other part, after reciting that both Edward Leech and the plaintiff had for some time then past practised at Chichester their professions of surgeons and apothecaries, on their separate accounts, but that the practice of Edward Leech had been carried on for a longer period and was to a greater extent than that of the plaintiff; and that it had been lately agreed between them, that, in consideration of Mr. Freeland paying to the former 900*l.*, they would enter into and execute those articles of partnership; and that the plaintiff had paid to Mr. Leech the sum of 900*l.*: In consideration of that sum so paid, and also of their mutual trust and confidence, each of them, Mr. Leech and the plaintiff, covenanted with the other of them, that they would become and continue partners in the profession or business of surgeons, apothecaries, and men-midwives, from the 1st of January, 1850, for a term of seven years, if both of them should so long live, under the style of "Leech and Freeland," upon the terms in that indenture expressed; and that the partners should be entitled to the net gains and profits of the copartnership business in the proportions following: that Mr. Leech should take two equal third parts, and the plaintiff the remaining third part thereof.

The articles of partnership were executed by both parties, and the 900*l.* was paid on the 1st of January, 1850.

Mr. Leech and the plaintiff carried on the partnership practice until the 5th of June, 1851; when Mr. Leech was, on the petition of one of his creditors, adjudged bankrupt, and the defendants were appointed assignees, and the partnership was thereby terminated.

The official assignee, immediately after the bankruptcy, served notices on the debtors to the firm, requiring them to pay their debts to him. The plaintiff remonstrated, and offered to collect the debts; but the assignees required him, as the condition of his being allowed to do so, to give security that he would do so with due diligence, and pay two-thirds of the amount of the debts to the official assignee, and also to submit to and abide by the decision of the Commissioners in Bankruptcy in all questions between him and the assignees. The plaintiff declined these terms. The outstanding debts were upwards of 950*l.*

Under these circumstances the plaintiff filed this bill. By it he alleged, that Mr. Leech was insolvent at the time when he entered into the articles of partnership and received the 900*l.* from the plaintiff, and that his bankruptcy had been the result of his living beyond his means; and that by reason of the bankruptcy the plaintiff had been deprived of that for which he had agreed to pay, and had paid 900*l.*; and asked to have the affairs of the partnership wound up, and the debts thereof, including a proportionate part of the sum of 900*l.*, duly paid and discharged out of the debts owing to the partnership at the date of the bankruptcy; and after such payments to receive his share of the said debts and effects of the partnership. The plaintiff, also, claimed to have a lien on the partnership assets for a proportionate part of the 900*l.* which he had paid.

The case made by the defendants was, that the profits of the partnership had during its continuance amounted to 1646*l.* 10*s.* 10*d.*, and that the share to which the plaintiff was entitled was one-third thereof, which he had actually received; and that such profits had been principally and almost entirely made from the professional attendance of the partners upon persons formerly the patients of Mr. Leech, and not of the plaintiff; and that he had, by the introductions he had obtained, a good profes-

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*Statement.*

sional connection at Chichester, where the plaintiff continued to practise alone.

It also appeared, that the plaintiff had been qualified as a medical practitioner only a few months before he entered into the partnership with Mr. Leech, and that he had had a very small practice; but that the bankrupt had been in practice for some years at Chichester, and that he had obtained a very large and highly respectable practice.

*Jan. 12th.*

*Argument.*

Mr. *Wigram* and Mr. *Giffard* now appeared in support of a motion by the plaintiff for a receiver.

Mr. *Malins* and Mr. *H. Stevens*, for the defendants the assignees, submitted, that the 150th section of the Bankrupt Law Consolidation Act of 1849, authorised the assignees to collect the debts due to the firm in which the bankrupt was a partner; and that the jurisdiction as to the collection of the partnership assets in which there might be a partner who should become bankrupt was transferred to the Commissioners sitting in the bankruptcy (*a*).

(*a*) By the Bankrupt Law Consolidation Act, 1849, (12 & 13 Vict. c. 106), s. 152, it is enacted, "That if any person adjudged bankrupt shall, at the time of the adjudication of bankruptcy, be a member of a firm, it shall be lawful for the Court to authorise the assignees, upon their application, to commence or prosecute any action at law or suit in equity, in the name of such assignees and of the remaining partner, against any debtor of the partnership, and such judgment, decree, or order may be obtained therein as if such action or suit had been instituted with the consent of such partner, and if such partner shall execute any release of the debt or demand for which such action or suit is instituted such release shall be void; provided that every such partner shall have notice given him of such application, and be at liberty to shew cause against it, and, if no benefit be claimed by him by virtue of the said proceedings, shall be indemnified against the payment of any costs in respect of such action or suit, in such manner as the Court may direct; and that it shall be lawful for such Court, upon the application of such partner, to direct that he may receive so much of the proceeds of such action or suit as such Court shall direct."

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Similar clauses will be found in 6 Geo. 4, c. 16, s. 89; and 5 & 6 Vict. c. 122, s. 31.

It has been the general practice for the assignees of a bankrupt partner to interfere in the partnership, and get in the debts, and to take the necessary proceedings by action or suit to do so, sometimes under the authority of a general order of the Court of Bankruptcy, and at other times under a separate order upon each occasion: *Ex parte Wilson* (*a*).—They also cited *Ex parte Farlow* (*b*).

Judgment.

The VICE-CHANCELLOR (Sir JAMES PARKER) said,—

He thought the section referred to did not take away the jurisdiction of this Court between the solvent partner and the assignees of the bankrupt partner, or affect the ordinary right of a partner to the interference of this Court; and that the plaintiff was entitled to an order for a receiver.

By an arrangement, the plaintiff was subsequently appointed receiver.

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*June 27th.*

Argument.

The cause now came on for hearing.

Mr. *Wigram* and Mr. *Giffard*, for the plaintiff, cited *Bury* v. *Allen* (*c*), and *Hirst* v. *Tolson* (*d*).

Mr. *Malins* and Mr. *H. Stevens* for the defendants.—The bankruptcy was rather a benefit than a loss to the plaintiff. He was a very young man, who had by means of the partnership obtained an introduction into a large and respectable practice; a very large part of which he retains. His case is, therefore, not one of hardship. The plaintiff has no claim for a return of premium. He purchased a partnership, and had the benefit of it during all its continuance. Its termination might have been by Mr.

(*a*) 3 Mont. & A. 219; and 2 Dea. 387.

(*b*) 1 Rose, 421.

(*c*) 1 Coll. 589.

(*d*) 16 Sim. 620; *S. C.*, 2 Mac. & G. 134.

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*Argument.*

Leech's death, in which event he would not, except upon special contract, have had any claim to a return of premium, neither can he have any such right upon the bankruptcy of his partner which in this case was in invitum.

But if the plaintiff has any claim it is upon the covenant contained in the articles, which is a debt, and, like any other debt of the bankrupt, is proveable in the bankruptcy.

There can be no lien.

*Judgment.*

The VICE-CHANCELLOR:—

The question is, whether, in winding up the affairs of this partnership, the plaintiff, who is the solvent partner, is entitled to credit for any part of the sum of 900*l.* paid by him as a premium on his entering into a partnership with Mr. Leech. The partnership articles do not shew that the plaintiff paid the 900*l.* as a premium for an introduction to a connection; but, as the price of his right to a certain proportion of the profits of the partnership for the term of seven years, during which the partnership was to continue. The partnership had not lasted quite a year and a half, when Leech, who had received the 900*l.* thus paid by the plaintiff, became bankrupt. The bankruptcy put an end to the partnership; and there was an end to the performance of the stipulations which Leech had entered into with the plaintiff, and for which the sum of 900*l.* was paid. It is, therefore, not unnatural,—the term of the partnership being thus cut short, not by any act of the plaintiff, but by the act of Leech,—that the plaintiff should claim to have a return of some proportion of the premium which he had paid to the bankrupt as the price of that which he could no longer obtain.

It is a settled principle, that, if money has been paid as the consideration for a contract which fails, this Court will restore to the person who has paid the money a due proportion of it, having regard to the extent to which the consideration has failed. The principle has been

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*Judgment.*

clearly stated by Lord *Cottenham* in *Hirst* v. *Tolson* (*a*), where that learned Judge said, that, "if, independently of the right under the covenant, there is a right arising from the transaction itself, and which would have existed if there had been no covenant—namely, to a return of a portion of the money paid, upon the ground that the consideration for which it was paid failed; then that would certainly be a ground of equitable interference, which this Court would regard in administering the estate of an intestate." Here, the equity sought is in administering the affairs of this partnership, which has come to an untimely end, and therefore the greater part of that for which the consideration has been paid is gone. It is true that *Hirst* v. *Tolson* is not a case of partnership, but relates to the return of the portion of the premium paid by a clerk upon articles of apprenticeship. But the principle applies to a contract for a partnership as much as to any other. The case of *Hamill* v. *Stokes* (*b*) was similar to the present. That was a case of articles of partnership. There a young man, being prevailed upon to enter into a partnership with an attorney, in consideration of being admitted into copartnership with him for a term of five years, bound himself to pay 1050*l*. The partnership was interrupted in a very extraordinary way: for the bankruptcy by which it was interrupted was that of the young man who was to have paid the premium, and the commission of bankruptcy was sued out by his own partner. No doubt the facts of that case involved a question as to the propriety of the conduct of the partners, but the principle must be still the same. The principle upon which the Court interferes is, that the consideration in respect of which the money is paid fails, and is not obtained by the person who pays the money, in consequence of an unforeseen interruption. Lord *Eldon*, in the case of *Tattersall* v. *Groote* (*c*), acted on the same principle. It is

(*a*) 2 Mac. & G. 134. (*b*) 4 Price, 161. (*c*) 2 B. & P. 131.

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of course important to see that the claim is made on just grounds; and that the failure of consideration has not been occasioned by the act of the person seeking relief. In this case, part of the complaint of the bill is, that the circumstances of Leech were such at the time when the partnership was entered into that he must have known, although the plaintiff did not know, that there was a probability of the partnership being interrupted by the event which afterwards actually occurred. The evidence shews, that when Mr. Leech received this 900*l.* he was not in flourishing circumstances. His bankruptcy is not accounted for as having been occasioned by any sudden or unexpected loss, but by a progressive course of expenditure beyond the amount of his receipts from his practice. Nor was his bankruptcy brought about at all at the instance of his partner. The plaintiff is thought entitled to a return of a proportionate part of the premium. It remains to be considered whether as to this proportion the plaintiff is to prove as a creditor against the estate, or merely have the amount allowed to him as a sum to his credit in winding-up the partnership affairs. The right to the return of this proportion must arise out of the contract of partnership. It would be a strange thing to say that a solvent partner, with a claim against his bankrupt co-partner, which arises out of the partnership contract, is not entitled to have that claim allowed on settling the partnership accounts. It is said, on behalf of the defendants, that the plaintiff's course is to recover as upon a legal right, which presupposes some independent contract and injury in respect of which this right accrued. Here there is no such right, and no independent contract. The right to recover a proportion of this 900*l.* arises from the actual contract of partnership. The principle of lien applies to the case, because the plaintiff, as the only solvent partner, is entitled to receive all the debts due to the partnership.

As to fixing the amount of the proper proportion for the

plaintiff to receive, there was a case before Lord *Somers*(*a*), —one of a class of cases which seem frequently to have arisen, viz. that of a premium of apprenticeship, where the course taken by that great Judge was to fix the amount according to the estimate which he had formed in his own mind. I intend to follow this precedent. The declaration will be, that in taking the accounts the plaintiff ought to have credit for the sum of 700*l.*

With respect to the receivership, I cannot understand upon what principle the official assignee, or any other assignee in bankruptcy, should have interfered with the affairs of this partnership, and with the collection of the debts by the solvent partner. This conduct might have ruined the solvent partner, and might have compelled him to come to this Court to assert his rights. It is most important to the public that questions as to the rights of surviving and solvent partners should be understood, and that it is their right to collect the partnership debts. I shall give the defendants' counsel the opportunity of shewing why the official assignee interfered in the way he did.

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The case was then argued on the question of costs; but his Honour, after considering all the circumstances, thought that there should be no costs on either side up to this hearing.

(*a*) See *Therman* v. *Abell*, 2 Vern. 64.

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*June 28th & 30th.*

## THE ATTORNEY-GENERAL *v.* ALFORD.

The executor and trustee of a residue given for a charity, to be administered with the approbation of the rector and churchwardens, did not communicate the fact of the bequest to them, but held the trust fund in stock in his own name from 1840 till 1852. The rector and churchwardens accidentally heard of the bequest in 1852, and were proceeding to file an information, when the trustee, who admitted possession of the fund, invested it in 3*l.* 5*s.* per cents., and transferred it into Court under the Trustee Relief Act. The Court, holding such conduct to be a gross neglect of duty, repudiated the investment, and charged the defendant with the balances in his hand as cash, with interest at 5*l.* per cent., with annual rests; and refused to allow him his costs up to the hearing.

On appeal the decree was varied as to the interest from the rate of 5*l.* per cent. with rests, to 4*l.* per cent. without rests; and as to costs by charging the defendant with them up to the hearing.

THIS was an information for an account of the residuary personal estate of a testator, who had, by his will, given it to charitable purposes, against the sole defendant, who was the sole executor and trustee under the testator's will, who had, in 1842, realised the amount, and had from that time kept the amount, and invested part of it in his own name as his own monies, until 1852, when the trust became otherwise publicly known. Prior to the filing of the information, the executor had invested the amount, together with a sum representing what would have been the amount of the accumulated dividends on the stock, and transferred it into Court, in trust in the matter of the charity, under the Trustee Relief Act.

The questions were, on what terms the account should be taken against the executor and trustee, and as to his costs.

The Rev. James Cutler, who, being an unbeneficed clergyman, was clerk to the dean and chapter of Salisbury, and resided for some years in the parish of St. Edmund, in that city, by his will, dated the 11th of May, 1839, among other bequests, after giving a legacy of 100*l.* to the defendant Mr. John Lush Alford, whom he appointed the executor of his will, gave to Elizabeth Cutler, his sister, for life, the dividends to accrue due on 9000*l.* Three per Cent. Annuities; and he directed that, after her decease, the same should be converted into money by his executor; and that 6275*l.* cash, part of the produce of such conversion, should be applied in payment of certain specified charitable legacies; and he directed that his executor, Mr. Alford, should pay and apply the rest, residue, and remainder of his money and se-

curities for money and personal estate and effects, to the relief of such persons resident within the parish of St. Edmund, in the city of New Sarum, as might be sufferers from accidental losses or misfortunes, and which should not have been occasioned in any way by their own imprudence or misconduct; and he directed that the said residue of his estate and effects should remain in the hands of his executor, to be bestowed in such portions as the cases might deserve, with the joint consent and approbation of the rector and churchwardens for the time being of the said parish of St. Edmund.

The testator died on the 23rd of March, 1840.

Mr. Alford, who was the defendant's solicitor, and as such had prepared his will, proved it on the 21st of May, 1840.

Miss Elizabeth Cutler, the sister of the testator, died in September 1840.

Mr. Alford, in 1841, paid the specific pecuniary legacies; and an enumeration of these charities, and an announcement that they had been paid, appeared in the local papers; but no mention was made of the bequest of the residue.

Mr. Alford in 1842 passed the residuary account of the testator's estate, and the net residue that remained in his hands was 2100*l.* Three and a half per Cent. Annuities, but since converted into Three per Cent. Annuities.

The draft of the testator's will was left in Mr. Alford's office, deposited with the other draft wills there; and in 1847 Mr. Alford procured a book to be made and bound in black leather, and indorsed in large gilt letters with the words "Cutler's Charity." One of Mr. Alford's clerks shortly afterwards copied the will into the book, and there the matter rested.

Mr. Alford did not communicate the purport and effect of the testator's residuary gift to any one.

In 1847 William Beer, who had been a clerk to the defendant, and who was one of the attesting witnesses to the will, being an inhabitant householder in the parish of St.

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Edmund, applied to Mr. Alford to consider him a fit object of the testator's bounty, and to give him a portion of the charitable bequest; but Mr. Alford refused to do so. In 1851, the same person, being on his death-bed, informed some members of his family of the nature and purport of Mr. Cutler's gift. These statements led to an inquiry on the subject. The result was, that the rector and churchwardens of the parish of St. Edmund became in December, 1852, for the first time acquainted with the terms of the residuary bequest made by Mr. Cutler. Mr. Charles Marsh Lee, one of the churchwardens of the parish, then applied to Mr. Alford for information on the subject; and Mr. Alford at once admitted that he had in his hands a large fund constituting the residue; and in a letter to Mr. Lee, dated on the 22nd of December, 1852, he stated that Cutler's charity fund, which had been duly accumulated, then amounted, with its accumulations, to about 4400*l.*, which was invested in Consols and in 3*l.* 5*s.* per Cent. Annuities.

An information by the Attorney-General, at the relation of the Rev. George Radcliffe, the rector, and Messrs. Charles Marsh Lee and Charles Fulford, the churchwardens of the parish of St. Edmund, was then prepared, printed, and submitted to the Attorney-General for his signature.

Whilst this information was before the Attorney-General, Mr. Alford, on the 28th of January, 1853, transferred into the name and with the privity of the Accountant-General of the Court of Chancery, in trust, in the matter of the trusts of the will of the Rev. James Cutler, deceased, and of an Act of Parliament made and passed for the better securing trust funds, and for the relief of trustees, and to an account, intitled "In the matter of the trusts of the will of the Rev. James Cutler, deceased," the sum of 4449*l.* 16*s.* 5*d.* 3*l.* 5*s.* per Cent. Annuities; and, by a notice in writing, he, on the following day, informed the Attorney-General, and the rector and churchwardens of the parish of St. Edmund, Salisbury, of his having so done.

Notwithstanding this proceeding, the information was filed, praying the usual accounts of the testator's estate, and that the defendant might be ordered to pay what should be found to be due and owing from him; and if it should appear that the defendant had improperly retained any balances in his hands or standing to his account, then that the defendant might be charged with interest thereon after such rate as the Court might direct.

The information also prayed for a declaration that the bequest was a good charitable bequest, and for a scheme for the arrangement of the charity.

The defendant, by his answer, denied that he had ever made any secret of the charitable bequest; but he admitted that, after procuring the book to be lettered "Cutler's Charity," and causing a copy of the will to be written therein in 1847, the matter had there rested.

The defendant also stated, that he had lost by the trust, in consequence of his having left dividends accruing due on parts of the funds invested unreceived, and by the failure of his bankers, with whom portions of the fund had been lodged.

By the decree, made on the hearing of the information on the 2nd of December, 1853, the usual accounts were directed, with inquiries whether the residue of the testator's personal estate was in the hands of the defendant, or whether the same had been invested by him; and when, and whether, the sum of 4592*l.* 2*s.* 2*d.*, 3*l.* 5*s.* per Cent. Annuities, then standing in the name of the Accountant-General of this Court, in trust in the matter of the trusts of the will of the Rev. James Cutler, deceased, properly represented the residue of the testator's estate.

It appeared by the Chief Clerk's certificate, dated the 22nd of April, 1854, that the following investments had been made at the following dates by the defendant: 472*l.* in the purchase of 500*l.* Consols, August 30, 1843; 285*l.* 15*s.* in the purchase of 300*l.* Consols, September 7th, 1843;

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1250*l.* in the purchase of 1436*l.* 15*s.* 7*d.* Consols, April 17th, 1847; and 231*l.* 18*s.* 8*d.* in the purchase of 236*l.* 13*s.* 4*d.* 3*l.* 5*s.* per Cent. Annuities, October 22nd, 1851; and that the monies belonging to the testator's estate, received by the said defendant, had been placed by him at his banker's, to his own private account, and mixed with his own monies. The Chief Clerk adopted the accounts rendered by Mr. Alford, and stated, that, in the second schedule to his certificate on the 17th of April, 1847, the defendant had credited himself with the payment of 1250*l.*, invested in the purchase of 1436*l.* 15*s.* 7*d.* Consols, being 674*l.* 7*s.* 10*d.* more than he had in his hands, as the proceeds of the trust fund, until the receipt of the dividends due April 5th, 1854, when he had 32*l.* 5*s.* 2*d.* in his hands; and he found that the 4592*l.* 2*s.* 2*d.*, 3*l.* 5*s.* per Cent. Annuities, with 72*l.* 8*s.* 11*d.* cash, properly represented the residue of the testator's estate, and was in excess thereof by 95*l.* 7*s.* 5*d.*

The cause now came on upon a motion on behalf of the Attorney-General, by way of exception, that the certificate of the Chief Clerk might be varied as being erroneous, inasmuch as by the second schedule thereto he had certified, that, on the 17th of April, 1847, the defendant had credited himself with the payment of 1250*l.* invested in the purchase of 1436*l.* 15*s.* 7*d.*, being 674*l.* 7*s.* 10*d.* more than he had in his hands, whereas the Chief Clerk ought to have certified, in addition thereto, that the stock, the residue of the testator's estate, was not placed or carried by the defendant to any account; and also inasmuch as the Chief Clerk had certified that a sum of 4592*l.* 2*s.* 2*d.*, 3*l.* 5*s.* per Cent. Annuities, with the sum of 72*l.* 8*s.* 11*d.* cash, properly represented the residue of the testator's estate, and was in excess thereof by a sum of 95*l.* 7*s.* 5*d.* The cause also came on for further consideration.

*Argument.*

Mr. *Bacon* and Mr. *Surrage* in support of the information. —The trust was a present active trust; but the defendant

Alford, though he accepted the trust, did for a series of years nothing. The several investments were made by Mr. Alford in his own name, and were nowhere marked as representing the funds of this charity; and they were for all that period in jeopardy, as if they had been Mr. Alford's proper monies; and it was not until December, 1852, in his letter to Mr. Lee, that Mr. Alford made any statement as to the amount or nature of the investments of the fund, or indeed whether there was any such fund. The fund, as to the whole, remained long after it had been ascertained, in Mr. Alford's own possession, mixed with his own monies; and when invested, the investment remained his own. The defendant had, in 1842, 2100*l.* in stock. The defendant ought, under the circumstances, to be charged with the value of that sum, and with interest thereon at 5*l.* per cent. per annum to the present time, with annual rests.

Mr. *Malins* and Mr. *G. M. Giffard* for the defendant.—The defendant submits to be charged with the 2100*l.* stock, with such sums as would be produced by the dividends on the same stock from 1842 as if these dividends had been regularly received and invested.

No fraud has been imputed to the defendant, and there is no ground for any such imputation. The trusts of the will directed that the income should be held by the defendant, who alone was to apply this income, with the approbation of the rector and churchwardens; the defendant therefore was alone the proper person to hold the dividends. The defendant was negligent in taking the proper steps to give effect to this charity; but that is the only ground of objection to his conduct. He has voluntarily invested a fund in Court to the credit of this cause to an amount which, in the opinion of the Chief Clerk, exceeds the amount he is properly chargeable with; and there is no ground to

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justify any variation of his finding, by charging the defendant with rents and interest at 5*l.* per cent., which course is only adopted *in pœnam* where the defendant is a defaulting trustee, who has used the trust fund for his own purposes. The parties who support this information ought to have been satisfied with the fund which has been invested, and to have confined their proceedings to obtain a scheme. Where a trust fund has been retained by a trustee in his own hands, the usual course of the Court is to charge the trustee with the amount in cash, with interest at 4*l.* per cent.: *Rocke* v. *Hart* (*a*), *Cracket* v. *Bethune* (*b*), *Tebbs* v. *Carpenter* (*c*), *Attorney-General* v. *Solly* (*d*).

The defendant had, before the suit was instituted, invested a sum more than sufficient to cover the amount upon such a calculation. The information, so far as it sought to charge the defendant with anything more, was improper, and the relators ought to be charged with the costs.

They also referred to Hill on Trustees, p. 370, and to the cases there collected.

Mr. *Bacon* was not called on in reply in support of the information.

*Judgment.*

The VICE-CHANCELLOR:

The question whether this gentleman, who submits to be charged with interest, ought to have the account of interest taken with annual rests, must depend upon his conduct. From 1840 down to the end of the year 1852, what he did in the administration of the trust for the benefit of the charity was—nothing. He kept the whole trust fund in his hands. He concealed from the rector and churchwardens of the parish that any such funds were in his

(*a*) 11 Ves. 58.
(*b*) 1 J. & W. 586.
(*c*) 1 Madd. 290.
(*d*) 2 Sim. 518. But see *Williams* v. *Powell*, 15 Beav. 461.

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hands; and but for the accident that a clerk of the defendant (who, being in his office where a copy of the will was, and knowing the nature of the charity,) had applied to the defendant as an object of the charity, and had had his application refused,—but for this refusal I see no reason to suppose, that, even up to this hour, the rector and churchwardens would have known of the existence of any charity to be administered, or that the defendant would have done a single act in discharge of the trust reposed in him. That course of conduct was a gross neglect of duty, and must be visited by this Court as the gross misconduct of any trustee is visited. The defendant says, he kept the matter no secret. What he means by that, I do not know; but this I know, that he told nobody, and that is the best way to keep a secret. Now, by way of excuse, the defendant says, that, in the year 1847, seven years after these rights had accrued, and after the charity had become entitled to the fund, he had a copy of the will made and bound up in black leather, marked with gilt letters on the back "Cutler's Trust," and that it was kept in his office. To treat that as an act in discharge of his duty, and as information to those whose duty it was to concur in the administration of the trust fund, is absurd. It is, I consider, no excuse for his conduct at all. It happened that this clerk, who became a poor man, made an application to the defendant, thinking himself a fit object of this charity, for aid, and was refused; and afterwards, upon his death-bed, he did that which his master ought to have done,—he communicated to the rector and churchwardens that this fund was impressed with this charity. That occasioned an application to the defendant; and the best that can be said for him is, that he immediately said he had the fund, and, when it ceased to be a secret, he invested the amount in 3*l.* 5*s.* per Cent. Annuities. That was not a proper investment; it was made without the concurrence of the persons who ought to have been con-

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sulted. It was then transferred into Court under the provisions of the Trustee Relief Act. This was an act entirely his own; it was ex parte, and on his own responsibility. In this state of things, where the trust fund has been kept in the hands of the trustee for a period of twelve years, without his divulging the nature of the trust, the Court must treat him as guilty of neglect and misconduct; and my duty is to repair, as far as I can, to this charity the loss which it has incurred by this trustee's conduct during all this period. I must do that by charging him, not only with interest, but also with annual rests. It is true that this is not done except in cases of misconduct and *in pœnam;* but the infliction of the penalty is deserved by this defendant, of whose conduct I very much disapprove. I must entirely repudiate the investment which the defendant made under the Trustee Act.

No scheme for the administration of the charity has been submitted to the Court. This is much to be regretted.

By the decree, it was declared that the sum of 2100*l.*, 3*l.* 5*s.* per Cent. Annuities was part of the charity fund. The defendant was to be charged with interest, at the rate of 5*l.* per cent. on the sum of 961*l.* 4*s.* 7*d.*, the balance of cash in his hands on the 30th of August, 1843; the accounts were ordered to be taken with yearly rests in computing the interest, and with like interest on the dividends half-yearly receivable on the 2100*l.* stock. The balance of the amount which the defendant had paid into Court under the Trustee Relief Act, after retaining as part of the trust fund in Court the sum of 2100*l.* stock, was, upon the defendant making the several payments as ordered, directed to be transferred back out of Court to him.

Mr. *Bacon* asked that the defendant might be charged with costs.

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*Judgment.*

The VICE-CHANCELLOR.—In the case of *Tebbs* v. *Carpenter* (*a*), a defaulting trustee was not charged with costs. I shall not charge the defendant with costs, but I shall allow him no costs up to this day.

As to the relators, the consideration of their costs must be postponed until after the scheme shall have been settled.

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The defendant appealed from this decree, which was heard by the Lord Chancellor, who, on the 26th of January, 1855, varied the decree, by giving interest at the rate of 4*l.* per cent. without rests, on the balance in the defendant's hands, instead of at the rate of 5*l.* per cent. with rests, and charged the defendant with the costs of the suit up to the hearing.

(*a*) 1 Madd. 290.

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*June 30th.*

## HAWKER *v.* HALLEWELL. Ex Parte STURGIS.

The eldest son of a tenant in tail male in remainder, of money, land, subject to the life estate of a tenant for life, obtained in 1842 the benefit of the Insolvent Debtors Act; and under the 37th section of that Act, the usual vesting order was made, and he gave the usual warrant of attorney to confess judgment. The insolvent became tenant in tail in possession in 1853, and executed a disentailing assurance; and, for valuable consideration, vested the fund in trustees for himself for life, with remainders over. Judgment on the warrant of attorney was not entered up until after the date of this settlement:—*Held*, that the title under the settlement had priority to that of the assignee in the insolvency.

THIS was the petition of Samuel Sturgis, Esq., the assignee of the estate and effects of the plaintiff, George Hawker, an insolvent debtor, by which it was prayed that the sums of 9337*l.* 2*s.* 8*d.*, Bank Stock, and 381*l.* 9*s.* cash, standing in Court to the credit of this cause, might be transferred and paid to the petitioner, or for the usual stop order on those sums.

The circumstances under which the petition was presented are as follows:

John Small, late of Clapham, by his will, dated in 1786, devised the manor of Snowshill and other real estates unto three trustees, their heirs and asigns, to certain uses, including a use which vested an estate with a remainder to the use of the Rev. Peter Hawker, for his life, with remainder to the use of the trustees, in trust to preserve the contingent remainders, with remainder to the use of the first and every other son of his body, with remainder to the use of the testator's right heirs. The testator, after giving certain legacies, gave the residue of his personal estate unto his three trustees, upon trust to invest the same in the purchase of freehold lands, to be settled upon the same uses and trusts as he had declared of and concerning his manor of Snowshill, with a power to the trustees, until the residue should be invested in lands, to purchase parliamentary securities, and to pay the dividends thereof to the person entitled to the rents and profits of the manor of Snowshill. The testator died on the 18th of May, 1786, and his will was shortly afterwards proved by the executors.

The Rev. Peter Hawker died on the 21st of November, 1808, leaving him surviving, his eldest son, George Hawker,

who died in August, 1843, leaving his eldest son, George Hawker, the plaintiff, him surviving.

In July, 1842, the plaintiff, being then a prisoner for debt in the gaol at Gloucester, petitioned the Court for the Relief of Insolvent Debtors for his discharge from prison; and by an order dated the 2nd of July, 1842, all his real and personal estate and effects (except certain specified chattels not exceeding 20*l.* in value), and all his future estate, right, title, interest, and trust, in or to any real and personal estate and effects, within this realm or abroad, which he might purchase, or which might revert, descend, be devised, or bequeathed or come to him before he should obtain his final discharge, were, in pursuance of the Act 1 & 2 Vict. c. 110, according to the adjudication made in that behalf, vested in the petitioner, who is the provisional assignee of the estates and effects of insolvent debtors in England, his successors and assigns, according to the respective natures, properties, and tenures thereof, in trust for the creditors of the plaintiff, who should be entitled to share in a dividend of the said estates and effects, under the provisions of the said Act, and for such other purposes as are by the said Act expressed.

The schedule of the plaintiff, filed by him under his insolvency, contained, inter alia, the following entry: "My interest, if any, in the property in reversion, remainder, or expectancy, under the will of John Small, deceased, dated the 25th of April, 1786, and proved in Doctors Commons, the 26th of May, 1786, and in the residuary personal estate, now subject to the trusts of the will, amounting to about 52,323*l.*, to which I have the bare hope of succession of an heir apparent in tail, and which expectant fund has been attempted to be charged by me, by certain post obit bonds and other securities given to certain creditors, as set out in my schedule."

The plaintiff was, on the 14th of November, 1842, examined as to the matters contained in the schedule, and executed the usual warrant of attorney, under the 85th

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section of the Insolvent Debtors Act, authorising the entering up of a judgment against him in the name of the assignee in insolvency.

By an order of the Insolvent Court, dated the same day, the plaintiff was adjudged and ordered to be discharged from custody, and to be entitled to the benefit of the Act forthwith, as to the several debts and sums of money due or claimed to be due on the 2nd of July, 1842, from the plaintiff to the several persons named in the schedule, as creditors.

The plaintiff's father, who was tenant in tail in remainder expectant on the death of Mr. Ponton under Mr. Small's will, died in August, 1843, and the plaintiff thereupon became tenant in tail in remainder; and upon the death of Thomas Ponton, on the 13th of April, 1853, he became tenant in tail in possession of the monies by the will directed to be laid out in the purchase of land.

Under an order made on the 17th of July, 1847, in the cause of *Ponton* v. *Hawker*, instituted by a Mr. Ponton for the appointment of a new trustee, and for the administration of the testator's estate, the residuary personal estate was transferred into the name of the Accountant-General in trust in the cause of *Ponton* v. *Hawker;* and at the death of Thomas Ponton, on the 13th of April, 1853, the same consisted of 15,000*l.* Bank Stock, 6420*l.*, 3*l.* per Cent. Annuities, 7173*l.* 14*s.* 3*d.*, 3*l.* per Cent. Reduced Bank Annuities, and 22,802*l.* 1*s.* 11*d.*, 3*l.* 5*s.* per Cent. Annuities.

By the effect of a disentailing deed, being an indenture dated the 20th of April, 1853, made between the plaintiff George Hawker of the one part, and Charles Hawker of the other part, the plaintiff became absolute owner in possession of the above funds.

By an indenture dated the 3rd of August, 1853, made between the plaintiff, George Hawker, of the first part, Frances Mary Hawker of the second part, and the defendants Joseph Watts Hallewell and William Woodruffe Kearsey

of the third part, the plaintiff, in consideration of the natural love and affection which he had for his cousin Frances Mary Hawker, and also in consideration of a settlement of certain other sums of money thereby made by her, assigned the said residuary personal estate to the defendants Joseph Watts Hallewell and William Woodruffe Kearsey, upon certain trusts, being trusts, first, to pay off all incumbrances, debts, and costs; and in the next place, to pay the sum of 2600*l.* to the plaintiff, his executors, administrators, and assigns, for his and their own benefit; and as to the residue of the said trust monies upon trust to invest the same, and pay the interest and annual proceeds to the plaintiff for life, with remainder to the said Frances Mary Hawker and other parties.

This suit had been instituted for the purpose of having administered the trusts of the above-mentioned indenture of the 3rd of August, 1853. A decree was made in the cause on the 3rd of December, 1853; and by an order, dated the 13th of January, 1854, and made upon the petition of the plaintiff and defendants in the cause of *Ponton* v. *Hawker* and in this cause, the sum of 9337*l.* 2*s.* 8*d.* Bank Stock, and the sum of 381*l.* 9*s.* cash in the Bank, standing in the name of the Accountant-General in trust in the former cause, were transferred and carried over in trust in this cause; and it was ordered, that the dividends to accrue on the said 9337*l.* 2*s.* 8*d.* Bank Stock should be paid to the plaintiff.

Under these circumstances, Mr. Sturgis presented this petition, alleging that the decree and the orders made in the cause had been made without any reference to the fact that the plaintiff had been insolvent, and asking that the funds might be paid to him, or, in the alternative, for a stop order.

It appeared that judgment upon the warrant of attorney, given by the plaintiff in 1842 to the petitioner, the assignee

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*Argument.*

in insolvency, had not been entered up until after August, 1853.

Mr. *Wigram* and Mr. *Osborne* in support of the petition. —The estate of the plaintiff in this cause was such an estate as passed under the terms of his conveyance and assignment to the petitioner, the provisional assignee.

The expectancy of the plaintiff, being that of an heir in tail in remainder after his father, was more in the nature of an estate than the mere possibility of an heir at law in the life of his ancestor. Lord *Hardwicke* said, that that was less than a possibility, but that he could bind himself as to it; he might by fine estop himself after descent to him: *Wright* v. *Wright* (*a*); and it was held that in this Court such possibility is assignable. In *Higden* v. *Williamson* (*b*), a possibility in a bankrupt was held to vest in the assignees. The words of the statute of 15 Eliz. c. 7, s. 2, upon which that decision was come to, "that the commissioners shall be empowered to assign over all that the bankrupt might depart withal," are not more extensive in their meaning than the clauses of the present Insolvent Debtors Act, under which the petitioner claims.

In *Lyde* v. *Mynn* (*c*), a covenant to charge an annuity on a fund in which the covenantor had at the time of his entering into the covenant no present interest, was held binding on the covenantor, and to be a charge on the fund when it came into his possession.

[The VICE-CHANCELLOR referred to *Harwood* v. *Tooke* (*d*), where an agreement between two persons having expectations from the bounty of a third was held to be binding.]

In *Meek* v. *Kettlewell* (*e*), Lord *Lyndhurst* said, that the assignment of a mere expectancy, when made for a valuable

(*a*) 1 Ves. sen. 409.
(*b*) 3 P. Wms. 131.
(*c*) 1 My. & K. 683.
(*d*) 2 Sim. 192.
(*e*) 1 Ph. 342, 348; *S. C.*, 1 Hare, 464.

consideration, would be supported in equity. On that principle the petitioner is entitled to the order he asks. He rests his claim on the vesting order which he obtained under the 37th section of the Insolvent Debtors Act (*a*).

*Argument.*

(*a*) By 1 & 2 Vict. c. 110, s. 37, it is enacted "That, upon the filing of such petition by such prisoner, or on the filing of such petition by such creditor or creditors as aforesaid, and the evidence in support thereof, as the case may be, it shall be lawful for the said Court for the Relief of Insolvent Debtors, and such Court is hereby authorised and required, to order that all the real and personal estate and effects of such prisoner, both within this realm and abroad, except the wearing apparel, bedding, and other such necessaries of such person and his family, and the working tools and implements of such prisoner, not exceeding in the whole the value of 20*l.*, and all the future estate, right, title, interest, and trust of such prisoner in or to any real and personal estate and effects within this realm or abroad which such prisoner may purchase, or which may revert, descend, be devised or bequeathed, or come to him, before he shall become entitled to his final discharge in pursuance of this Act, according to the adjudication made in that behalf; or in case such prisoner shall obtain his full discharge from custody without any adjudication being made by the said Court, then, before such prisoner shall be so fully discharged from custody; and all debts due or growing due to such prisoner, or to be due to him or her before such discharge as aforesaid, shall be vested in the provisional assignee for the time being of the estates and effects of insolvent debtors in England, and such order shall be entered of record in the same Court, and such notice thereof shall be published as the said Court shall direct; and such order when so made shall, without any conveyance or assignment, vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignee: Provided always, that in case the petition of any such prisoner shall be dismissed by the said Court, such vesting order made in pursuance of such petition shall from and after such dismission be null and void to all intents and purposes: Provided also, that in case any such vesting order as aforesaid shall become null and void by the dismission of the prisoner's petition, all the acts theretofore done by the said provisional assignee, or any person or persons acting under his authority, according to the provisions of this Act, shall be good and valid; and no action or suit shall be com-

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*Argument.*

The plaintiff executed a warrant of attorney to the petitioner under the 87th section of the Act (*a*), and that warmenced against such provisional assignee, nor against any person duly acting under his authority, except to recover any property, estate, money, or effects of such prisoner detained after an order made by the said Court for the delivery thereof, and demand made thereupon: Provided also, that when such vesting order shall have been made on the petition of a creditor as aforesaid, it shall be lawful for the said Court, if it shall seem just and right, but not without proof made to the satisfaction of the said Court of the consent of the petitioning creditor, to make order declaring such vesting order to be null and void, and the same shall thereupon be null and void to all intents and purposes."

(*a*) By 1 & 2 Vict. c. 110, s. 87, it is enacted, "That before any such adjudication shall be made with respect to any such prisoner, the said Court or Commissioner or justices shall require such prisoner to execute a warrant of attorney to authorise the entering up of a judgment against such prisoner in some one of the superior Courts at Westminster, in the name of the assignee or assignees of such prisoner, or of such provisional assignee if no other assignee shall have been appointed and shall have accepted such office, for the amount of the debts stated in the schedule of such prisoner so sworn to as aforesaid to be due or claimed to be due from such prisoner, or so much thereof as shall appear at the time of executing such warrant of attorney to be due and unsatisfied; and any such warrant of attorney is hereby declared not to be within the meaning of the said Act passed in the third year of the reign of his late Majesty King George the Fourth, nor shall it be necessary that the same should be executed in the presence of an attorney for such prisoner according to the provision hereinbefore in that behalf contained; and the order of the said Court for entering up such judgment shall be a sufficient authority to the proper officer for entering up the same, and such judgment shall have the force of a recognizance; and if at any time it shall appear to the satisfaction of the said Court that such prisoner is of ability to pay such debts or any part thereof, or that he is dead, leaving assets for that purpose, the said Court may permit execution to be taken out upon such judgment for such sum of money as under all the circumstances of the case the said Court shall order, such sum to be distributed rateably amongst the creditors of such prisoner according to the mode hereinbefore directed in the case of a dividend made after adjudication; and such further proceedings shall and may be had upon such

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rant of attorney gave an inchoate right to the petitioner to the fund, which he has since perfected by entering up a judgment upon the warrant of attorney.

*Argument.*

Mr. *Malins* and Mr. *Roxburgh* for the plaintiff, in the course of the argument, offered to transfer 500*l.* Bank Stock, part of the sum of 9337*l.* 2*s.* 8*d.*, to the petitioner, to be subject to the orders of the Insolvent Debtors Court.

Mr. *Bacon* and Mr. *Freeling* were for the trustees.

The counsel for the respondents were not called on.

*Judgment.*

The VICE-CHANCELLOR :—

The insolvency took place in July, 1842; and in that month a vesting order was made, by which, in the terms of the Act of Parliament, all the estate of the insolvent was vested in the present petitioner, and his claim to this fund is under that order.

What the Legislature has said by the 37th section of the 1 & 2 Vict. c. 110, is, that the estate which shall be vested in the assignee in insolvency shall be "all the real and personal estate of such prisoner, both within this realm and

judgment as may seem fit to the discretion of the said Court from time to time, until the whole of the debts due to the several persons against whom such discharge shall have been obtained shall be fully paid and satisfied, together with such costs as the said Court shall think fit to award; and no scire facias shall be necessary to revive such judgment on account of any lapse of time, but execution shall at all times issue thereon by virtue of the order of the said Court: Provided always, that in case any such application against any such prisoner shall appear to the said Court to be ill founded and vexatious, it shall be lawful for the said Court not only to refuse to make any order on such application, but also to dismiss the same, with such costs against the party or parties making the same as to the said Court shall appear reasonable, and the said costs shall be paid accordingly."

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*Judgment.*

abroad, except," &c., "and all the future estate, right, title, interest, and trust of such prisoner in or to any real and personal estate and effects within this realm or abroad, which such prisoner may purchase, or which may revert, descend, be devised or bequeathed, or come to him, before he shall become entitled to his final discharge." The insolvent obtained his final discharge by an order made in November, 1842. The petitioner contends, that, within the words of the Act, the insolvent had, before the month of November, 1842, acquired an estate or interest in this particular fund, which makes it properly subject to his claim. At that time the insolvent's father was tenant in tail in remainder subject to a life estate, which did not expire until the year 1853. It is said, that the insolvent, as eldest son of a tenant in tail in remainder, had an expectancy, a possibility. But it was only such a possibility as an heir apparent of any man who has a descendible estate vested in him may be supposed to have. Looking to the Act of Parliament, it is necessary to consider whether it is expressed in such terms as to vest in the assignee the interest of an heir apparent. What this insolvent had, was the possibility that, by the death of his father, without his having made a complete disposition of the estate under the provisions of the Act for the abolition of fines and recoveries, this estate might have descended or have come to him before his final discharge. But it did not come to him; and the Legislature has enacted, that such estate or interest as should descend or come to him before his final discharge is alone within the operation of the Act of Parliament. Mr. *Osborne* has referred me to the case of *Wright* v. *Wright* (*a*), where Lord *Hardwicke* said, that an heir apparent, though he has but a possibility, may by fine, which would operate as an estoppel, bar

(*a*) 1 Ves. sen. 409.

himself of his right to take it when the property descends to him. The law is so. But how can I infer from that proposition that a vesting order in the assignee in insolvency shall operate by way of estoppel?

There seems to be nothing in the provisions of the 37th section of the Act to vest in the assignee this possibility of inheritance which the son had, but which was a mere possibility or expectancy in respect of which no estate or right came to him before the final order for his discharge. The words expectancy or possibility are not in the clause.

It is said, however, that in April, 1853, the right was acquired by the son; and that in August, 1843, when his father died, the insolvent became tenant in tail in remainder; and that under the 87th section of the Insolvent Debtors Act there are provisions which direct that the insolvent shall give an authority to the assignee, by warrant of attorney, to enter up a judgment against him. That authority was given before the insolvent's final discharge. If a judgment had been entered up at the time under that authority, there might have been strong ground for sustaining the claim of the assignee under such a judgment.

But although there was authority to enter up a judgment, the judgment was not in fact entered up at any time before the right or title of the insolvent to the property accrued in possession; and therefore there was no right which the assignee could assert.

Whether it was the duty of the assignee to have entered up the judgment, is not a question now before me. According to the natural and true construction of the 87th section of the Act, it must be shewn that it was entered up before the month of August, 1853. The father having died in April, 1853, the insolvent then became tenant in tail in possession, and then, if the assignee had come in time with his judgment, it would have had its full operation. But the assignee not having come in time, the insolvent, before

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any judgment was entered up, dealt with the property himself by vesting it in trustees for the benefit of his creditors,—a very laudable and proper mode of dealing with it. The judgment not having been entered up before the property was so dealt with, it seems impossible to hold, under the 87th section of the Act, that the existence of the authority to enter up the judgment is the same as if it had been actually entered up. This view of the effect of the warrant of attorney is confirmed by the direction in the Act, that an order of the Insolvent Court must be obtained, to authorise the judgment to be entered up. This shews that the entering up the judgment is not a matter of course.

It cannot be right to attribute the same effect to the warrant of attorney alone, as if an order had been actually obtained, and the judgment had been actually entered up upon it. If a provisional assignee sleeps upon his rights for ten years, and does not enter up judgment during that time, it seems a wise and just provision of the Act of Parliament which enables the Court to hold that the mere existence of a warrant of attorney under the 87th section has not the same effect as if a judgment had been actually entered up. That puts an end to the claim of the petitioner altogether, for he has no better right to the sum of 2600*l.* than he has to the other property. The order for the payment of the 500*l.* stock will be made by consent, and each of the parties must bear his own costs.

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*Dec.* 13*th.*
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*July* 11*th &* 12*th.*

## BATES *v.* BROTHERS.

A judgment creditor of a beneficed clergymen is prevented by the stat. of Elizabeth from suing in equity to have his judgment made a charge under the stat. 1 & 2 Vict., which makes the judgment have the same effect as a charge in writing.

On motion for a receiver at the suit of an equitable incumbrancer, where another equitable incumbrancer later in date had acquired a legal possession, the Court refused to disturb the possession so acquired, and refused the motion for a receiver.

THIS was a suit by Mr. Bates and his partners, constituting the banking firm of Sir J. D. Paul & Co., who were creditors of the Rev. James Brothers, under a judgment of Hilary Term, 1851, and forthwith duly registered in the Common Pleas, and an indenture, dated the 15th of November, 1851, against Mr. Brothers, Mr. Abraham Dangerfield, and the Archbishop of Canterbury; and it sought a declaration by the Court that a judgment against Mr. Brothers, duly entered up in the Court of Queen's Bench upon a warrant of attorney given by him to the plaintiffs, which had been duly registered in the Common Pleas on the 25th of January, 1851, had become and was a charge upon the rectory of Monks Horton and the vicarage of Brabourne, in the county of Kent, and upon all other the ecclesiastical goods of the defendant James Brothers, in the diocese of Canterbury, in priority to a judgment at the suit of the defendant Abraham Dangerfield, duly entered up and registered in the Common Pleas, and upon which he had obtained a sequestration, and had entered into the possession of the rectory and vicarage, and the receipt of the ecclesiastical revenues thereof. The bill also asked for the usual accounts, and for a receiver, and an injunction against the Archbishop of Canterbury and the defendant Dangerfield.

Two questions arose in this case:—

First. Whether the plaintiffs, by force of their judgment registered in the Common Pleas, had a title prior in equity to the judgment of Mr. Dangerfield, whose judgment, though registered at a subsequent date, had been followed by the sequestration?

Secondly. Whether the plaintiffs had, by the recitals

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in the indenture of the 15th of November, 1851, abandoned the right to the charge on the benefices which they claimed?

The following are the circumstances of the case:—

The defendant Brothers, on the 24th of January, 1851, gave a warrant of attorney to the plaintiffs, who, on the following day entered up a judgment thereon as of Hilary Term for the sum of 600*l.*, and duly registered it in the Common Pleas.

A memorandum, dated the same 24th of January, 1851, was indorsed upon the warrant of attorney, and signed by the defendant Brothers only, stating that it was given to secure the payment from the defendant Brothers to the plaintiffs of 300*l.*, and interest at 5*l.* per cent., on the 24th of January, 1854.

An indenture, dated the 15th of November, 1851, was made between the defendant Brothers of the first part, and the plaintiffs of the second part. It contained a recital in the following terms: "And whereas the said James Brothers has requested the said parties hereto of the second part to allow him to receive the said rent charge (being the rent charge of the said ecclesiastical benefices) for his own use, which they have agreed to do upon having the security hereinafter contained." The defendant Brothers, in consideration thereof, and of the above sum of 300*l.* having been lent to him, assigned all the underwood growing on a certain piece of land, containing eight acres, situate in the parish of Monks Horton, and also all his furniture and effects in and about and belonging to his dwelling-house in the parish of Brabourne, to the plaintiffs, subject to a proviso for redemption on the payment of the said sum and interest on the 24th of January, 1852. This indenture was given for the same sum as was secured by the plaintiffs' judgment, and was given by way of collateral security for the same.

The sum of 300*l.* not having been paid, the plaintiffs, in

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1852 and 1853, under their power of sale, sold the underwood and furniture comprised in their security of the 15th of November, 1851. The proceeds of both sales, after payment of certain costs and expenses, reduced the debt due to the plaintiffs to 200*l.*

On the 13th of December, 1851, a judgment was entered up as of Michaelmas Term in the Court of Queen's Bench against the defendant Brothers by the defendant Dangerfield for 8000*l.* and costs, payable on the 30th of November, 1852: that judgment was duly registered in the Court of Common Pleas. In 1852 the defendant Dangerfield sued out a writ of sequestrari facias upon his judgment, directed to the Archbishop of Canterbury.

The Archbishop, on the 31st of December, nominated and constituted the defendant Abraham Dangerfield to be the sequestrator of the rectory of Monks Horton and the vicarage of Brabourne, and of the rents and profits thereof, and of other the ecclesiastical goods of the defendant Brothers within the province.

There was a prior sequestration then in force, which was satisfied in March, 1853; and forthwith thereupon the defendant Abraham Dangerfield entered into the possession of the rectory and vicarage, and into the receipt of the rents and profits thereof, and has ever since continued in such possession.

*Dec.* 13*th.*
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Mr. *W. D. Lewis* now moved for a receiver, and for an injunction to restrain the defendant the Archbishop of Canterbury from further proceeding with the execution of the sequestration obtained by the defendant Dangerfield; and also for an injunction to restrain the defendant Dangerfield from proceeding with the execution of the sequestration, or from taking any proceedings on his judgment against the rectory and vicarage, and the profits thereof. He submitted that the plaintiff's judgment had, notwithstanding the 13 Eliz. c. 20, on its registry in the Court of

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Common Pleas, become an actual charge in equity on the rectory and vicarage, under the provisions of the 1 & 2 Vict. c. 110, ss. 13 and 19 (*a*).

(*a*) By the 1 & 2 Vict. c. 110, it was enacted:—

Sect. 13. "That a judgment already entered up, or to be hereafter entered up, against any person in any of her Majesty's superior Courts at Westminster, shall operate as a charge upon all lands, tenements, rectories, advowsons, *tithes*, *rents*, and hereditaments (including lands and hereditaments of copyhold or customary tenure) of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments; and that every judgment creditor shall have such and the same remedies in a Court of Equity against the hereditaments so charged by virtue of this Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same with the amount of such judgment debt and interest thereon: Provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment, or in cases of judgments already entered up, or to be entered up before the time appointed for the commencement of this Act, until after the expiration of one year from the time appointed for the commencement of this Act, nor shall such charge operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up, unless such judgment shall have been entered up one year at least before the bankruptcy: Provided also, that, as regards purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this Act, such judgment shall

The effect of these sections as they applied to ecclesiastical benefices was considered and decided in the case of *Hawkins* v. *Gathercole*, before the present Lord Chancellor when Vice-Chancellor (*a*). The sequestrator was in possession in that case; but his Lordship held, that a judgment duly registered against a clergyman was, under the 13th sect. of the 1 & 2 Vict. c. 110, an actual charge upon his benefice, and granted a receiver of the benefice. The present is precisely that case.

Mr. *Glasse* and Mr. *J. V. Prior* for the defendant Dangerfield.—The defendant Dangerfield is now in the actual legal possession of the benefice. This legal benefit has been obtained by greater diligence, and a Court of

not affect lands, tenements, or hereditaments, otherwise than as the same would have been affected by such judgment if this Act had not passed: Provided also, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of Courts of Equity whereby protection is given to purchasers for valuable consideration without notice."

Sect. 19. "That no judgment of any of the said superior Courts, nor any decree or order in any Court of Equity, nor any rule of a Court of common law, nor any order in bankruptcy or lunacy, shall by virtue of this Act affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute, containing the name, and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby; and the Court and the title of the cause or matter in which such judgment, decree, order, or rule shall have been obtained or made, and the date of such judgment, decree, order, or rule, and the account of the debt, damages, costs, or monies thereby recovered or ordered to be paid, shall be left with the senior Master of the Court of Common Pleas at Westminster, who shall forthwith enter the same particulars in a book, in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, decree, order, or rule; and such officer shall be entitled for any such entry to the sum of five shillings; and all persons shall be at liberty to search the same book on payment of the sum of one shilling."

(*a*) 1 Sim. N. S. 63.

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*Argument.*

Equity will not disturb a legal possession where the equities are equal; and his right is not questioned, except that the plaintiffs seek priority over him.

The contract between the plaintiffs and the defendant Brothers was by force of the warrant of attorney and of the judgment to give the plaintiffs an actual charge upon the ecclesiastical benefice of the latter, which is prohibited by the stat. 13 Eliz. c. 20, which enacted, that all charging of benefices with cure with any pension or any profit out of the same, other than rents to be reserved upon leases, should be utterly void. The Statute of Elizabeth was repealed by the 43 Geo. 3, c. 84; but this last enactment was repealed, and the Statute of Elizabeth again came into operation, on the passing of the 57 Geo. 3, c. 99. This motion is to give effect to an illegal contract. It is a motion precisely similar to that which was made in *Long* v. *Storie* (*a*), in which the Lord Justice *Knight Bruce*, when Vice-Chancellor, said the transaction pointed so particularly to a charge upon the benefice, that the Court could not, without giving its aid to simony, accede to the motion.

The Vice-Chancellor *Kindersley*, in the case of *Lane* v. *Horlock* (*b*), held, that, where a judgment was obtained by an agreement to secure on land the repayment of a loan with usurious interest, under the effect of the recent statutes which make a judgment a charge on land, such a contrivance should not prevail against the Usury Laws; and he refused to give effect to such a judgment. The reasoning of his Honour is applicable to the present case, and is, it is submitted, irreconcilable with the decision in *Hawkins* v. *Gathercole*, which was contrary to the opinion previously prevalent in the profession; and as that decision is now under appeal, the decision of the Court should be to refuse this motion.

(*a*) 3 De G. & S. 308. (*b*) 1 Drew. 587.

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*Argument.*

But even if the Court should be disposed to act on the authority of *Hawkins* v. *Gathercole* in preference to *Long* v. *Storie* and *Lane* v. *Horlock*, as to the effect of the judgment on the benefice, still the indenture of the 13th of November, 1851, disentitles the plaintiffs to the relief they seek: by the recitals in that deed the plaintiffs gave up to Mr. Brothers the fruits of his benefice, relying on the security then expressly given to them on the furniture.

Mr. *De Gex* appeared for the Archbishop of Canterbury.

Mr. *Lewis* in reply.—This case being precisely the same as that of *Hawkins* v. *Gathercole*, the plaintiffs' right is to have a similar order as was made in that case. It is submitted, that, although the recital in the indenture of the 15th of November, 1851, might give some colour to the argument, the plaintiffs intended thereby to waive their rights as judgment creditors, yet that is not the case, as is manifest from the whole scope of the instrument.—He cited *Gibbons* v. *Hooper* (*a*), *Moore* v. *Ramsden* (*b*), and *Colebrook* v. *Layton* (*c*).

In the course of the argument Mr. *Lee*, as amicus curiæ, mentioned *Flight* v. *Salter* (*d*), and *Kirlew* v. *Butts* (*e*).

The VICE-CHANCELLOR:—

*Judgment.*

The effect of granting this motion would be to put the plaintiffs in possession of the fruits of that ecclesiastical benefice which their debtor Mr. Brothers, the incumbent of that living, gave them as a security upon the instrument on which they found their case.

I am glad that it is not necessary for me to deal with one very difficult and important question argued in this

(*a*) 2 B. & Ad. 734.
(*b*) 3 B. & Ad. 917, note.
(*c*) 4 B. & Ad. 578.
(*d*) 1 B. & Ad. 673.
(*e*) 2 B. & Ad. 736, note.

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case, as to the construction of the statute of Elizabeth as applied to the state of the law now under the statute of Victoria, and to the terms of the securities in respect of which the plaintiffs make their claim. If it were necessary for me to decide the case upon that ground, I feel myself so strongly pressed with the authorities and the case of *Long* v. *Storie*, that I should have had great difficulty in holding, consistently with that case, that the plaintiffs could maintain their right in the present contest. The case of *Hawkins* v. *Gathercole*, if it is to be supported at all, must be supported on a principle inconsistent with the decision in *Long* v. *Storie*. It is very true that the decision in *Hawkins* v. *Gathercole* proceeded in a very marked way upon this, that the debtor against whom the judgment was pressed was not at the time when the right of the plaintiff accrued under it in possession of the ecclesiastical benefice; but it is not easy to see what difference that can make, looking at what I conceive to be the true construction of the statute Elizabeth. But if it were necessary for me to decide that question, I should not do it without taking much time to consider and weigh the authorities, which I ought not to presume to be irreconcilable without an elaborate examination, although at present I cannot reconcile them to my own mind. Reference has been made on this part of the case to *Lane* v. *Horlock;* and unquestionably the reasoning of the very learned and able Judge (the Vice-Chancellor *Kindersley*), in that case is strongly against the application of the present plaintiffs. But it is not easy to reconcile the views taken by the present Lord Chancellor in his judgment in *Hawkins* v. *Gathercole* with the grounds of the judgment in *Lane* v. *Horlock*, as stated in the printed report. I am glad, therefore, to find that I can dispose of this case without being obliged to enter into that vexed question.

I think it is the doctrine of this Court, that, if there are

several equitable incumbrancers, one of whom, although subsequent in date to the prior equitable incumbrancers, by greater diligence gets, in aid of his equitable incumbrance, a legal right, of which this Court finding him possessed, will not readily disturb him in his possession. It was very truly stated in argument, that in *Hawkins* v. *Gathercole* exactly that state of things occurred, and that there the Court interfered to disturb the legal right under the sequestration in favour of a judgment creditor who sued in respect of his equitable right. But the case was not argued upon that ground, nor was that doctrine referred to in the judgment. But that doctrine is too strong to permit me to grant this application for a receiver, which would avoid the sequestration, by which a more diligent judgment creditor has obtained possession of the fruits of the benefice.

The true construction of the indenture of the 15th of November, 1851, seems against the plaintiffs. The plaintiffs have given up the possession of the fruits of this benefice in favour of the defendant, the owner of the benefice, under such circumstances, that the Court could not appoint a receiver at the suit of the plaintiffs without violating the contract. The recital of the defendant's security is, in plain language, that "the said James Brothers had requested the parties of the second part," that is, the present plaintiffs, "to allow him (Brothers) to receive the rent-charge for his own use, which they had agreed to do upon having the security thereinafter mentioned," that is, the express security on the furniture. The rest of the instrument proceeded on that recital, and the plaintiffs, taking the furniture, agreed to allow Brothers to remain in possession of the rent-charge. Having taken the benefit of the furniture, the plaintiffs now seek to gain the rent-charge also, and to disturb the arrangement.

It has been said, that the latter part of the instrument contradicts this recital; but, upon looking at it attentively

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there seems to be no contradiction. I think that the language of this instrument shews it to be an integral part of the contract, that the plaintiffs should have the security of the furniture, and that the fruits of this benefice should be allowed to remain in possession of Mr. Brothers.

It is said, indeed, that the Court is not now asked to disturb the possession of Mr. Brothers, but of the defendant, who is another person who has acquired his right under a judgment against Mr. Brothers. But if there is a distinct contract between the plaintiffs and Mr. Brothers, which puts the plaintiffs as against Mr. Brothers in such a situation as that they cannot, as against him, claim this rent-charge, upon what footing can the Court, consistently with the plaintiffs' contract, disturb, at the plaintiffs' instance, the right of the defendant's judgment creditor, who holds by a right under Mr. Brothers? The plaintiffs seem to be estopped and concluded by this recital and the terms of their security from getting possession of this rent-charge through a receiver after entering into such a contract.

This motion must be refused;—the defendant's costs to be costs in the cause.

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This motion was renewed before the Lords Justices, by way of appeal from the decision of the Vice-Chancellor, on the 16th of March, 1854, when their Lordships thought the question too doubtful to interfere in it upon an interlocutory application, and directed the motion to stand over until the hearing.

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*July 11th & 12th.*

The cause came on for decision upon the hearing, and was argued on the 11th and 12th July.

*Argument.*

Mr. *Malins* and Mr. *W. D. Lewis* for the plaintiffs.—The plaintiffs are entitled to have priority over the defendant, Mr. Dangerfield. The plaintiffs' judgment was perfected and be-

came a charge on the ecclesiastical benefices of Mr. Brothers, by virtue of the 13th sect. of 1 & 2 Vict. c. 110. That section was intended to alter the law, wherever the judgment was void according to the decisions in cases under the stat. of Elizabeth, for it expressly constitutes a judgment a charge on "rectories and tithes," and it is the plaintiffs' right to have their judgment made available for the payment of the debt due to them.

They ask at this hearing for relief on the same principle as the present Lord Chancellor gave it on a motion for a receiver in *Hawkins* v. *Gathercole* (*a*). The plaintiffs' security being effectual, it was not competent for the defendant Mr. Dangerfield, claiming under a subsequent charge, to obtain priority over them by a prior writ of sequestration. This jurisdiction was entertained in *White* v. *Bishop of Peterborough* (*b*). There a third incumbrancer on a rectory having obtained a sequestration, a receiver was appointed on the motion of the second incumbrancer. The object of the 1 & 2 Vict. c. 110 was to give to judgment creditors more effectual and direct remedies against the estate of their debtors. That Act constituted a judgment creditor a mortgagee in equity, against which the possession of a subsequent incumbrancer cannot prevail: *Whitworth* v. *Gaugain* (*c*).

This case is stronger than that of *Whitworth* v. *Gaugain*, for Mr. Dangerfield had notice of the plaintiffs' judgment and title under it before he obtained his sequestration; whilst it appears that the elegit creditor in *Whitworth* v. *Gaugain* had no such notice. *Jones* v. *Jones* (*d*) is in support of this view of this case.

It has been contended by the defendants, that, by the indenture of the 15th of November, 1851, the plaintiffs waived or abandoned their charge against the ecclesiastical benefice, because they took further security by that deed.

(*a*) 1 Sim. N. S. 63.
(*b*) 3 Swanst. 109.
(*c*) 1 Phil. 728.
(*d*) 8 Sim. 633.

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But the effect of that instrument taken on the whole will not bear that construction.

*Argument.*

Mr. *J. V. Prior* for the defendant Mr. Dangerfield.—The decision in *Hawkins* v. *Gathercole* is the main ground on which the plaintiffs put their right to the decree they ask. That case is still under appeal, and is entirely opposed to *Long* v. *Storie* (*a*) and *Lane* v. *Horlock* (*b*); and in this state of the authorities it would be right for this Court to abstain from interfering with an actually existing legal possession.

The 1 & 2 Vict. c. 110, on which the plaintiffs rely, says merely that the registered judgment shall have the same effect as if the debtor had actually charged his property; but a clergyman could not, prior to that Act, have charged his ecclesiastical benefice, and therefore the Act gives to such a judgment no charge on the benefice, and the plaintiffs' case fails on this ground.

Mr. *De Gex* appeared for the Archbishop of Canterbury.

Mr. *Malins* in reply.—The plaintiffs rely on *Hawkins* v. *Gathercole*, which has been adopted by Vice-Chancellor *Wood*, in the recent case of *Pain* v. *Scott* (*c*), who said he considered it to be the settled doctrine of the Court.

The 1 & 2 Vict. c. 110 did not make a judgment good which was illegal before that Act; but it gave a new remedy to such judgments as, independently of it, were legal. The plaintiffs seek merely to have the further benefits on their effectual judgment which were conferred by the Act, namely, an actual charge on the benefice: *Moore* v. *Rowsden* (*d*), *Faircloth* v. *Gurney* (*e*), and *Newland v. Watkin* (*f*).

(*a*) 3 De G. & S. 308.
(*b*) 1 Drew. 587.
(*c*) March, 1854; not reported.
(*d*) 7 Ad. & E. 898.
(*e*) 9 Bing. 622.
(*f*) Id. 113.

The VICE-CHANCELLOR:—

The plaintiffs ask the Court to make a declaration that they have a valid charge upon the fruits of the benefice of the defendant Mr. Brothers, and ask for a receiver.

Upon the motion heard some time ago for the appointment of a receiver upon the same title on which this decree is asked, it seemed to me that the plaintiffs were not entitled to have a receiver appointed. An appeal against that decision has not yet produced a reversal; the appeal motion having been ordered to stand until the hearing of the cause.

I should have preferred that this hearing should have been before the Lords Justices, and not before me.

The relief sought by the plaintiffs is upon the footing, that, as judgment creditors under the provisions of the statute of the 1 & 2 Vict. c. 110, s. 13, they have an equitable charge upon the fruits of these benefices. I do not understand it to be disputed that the statute of Eliz. is now in force, and that an equitable charge by express contract in writing upon the fruits of an ecclesiastical benefice is invalid and cannot be enforced in this Court. The Court is now asked to give effect to the judgment of these plaintiffs as an equitable charge under the provisions of the statute of 1 & 2 Vict. c. 110, which say that a judgment creditor, who, under the 19th section, has registered his judgment, shall be entitled to sue in this Court upon as good a title as *if he had an equitable charge upon the estate by writing.* After the best consideration of the language of the statute, it has not been shewn how it is possible for this Court to give effect to the right claimed by the plaintiffs, and to declare their judgment a valid charge, upon any other footing than treating it as a charge in writing upon the fruits of these benefices; and if it be a charge in writing the statute of Eliz. says it is a void charge, and if so, how can the Court give effect to it?

It has been said that the effect of the 13th section of the statute 1 & 2 Vict. c. 110 is so far to do away with the disability

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imposed by the statute of Eliz. upon a charge of this kind, as to entitle a judgment creditor to a remedy under the statute of Vict. But the words of that statute expressly say that it shall be only considered a charge in writing *so far as the debtor had power to charge.* The words of the statute are clear, they are these:—[Here his Honor read the 13th sect. of 1 & 2 Vict. c. 110 (*a*).]

There is here no power given to charge by writing the fruits of an ecclesiastical benefice, and I cannot hold that any new power was conferred by the statute to charge anything which could not by writing have been charged before.

My opinion, therefore is, that the plaintiffs are not entitled to any declaration that they have a valid charge upon these benefices.

But what embarrasses me in this case is, that it has been decided by a Judge, whose authority is the highest in this Court, that, upon the construction of the statute of the 1 & 2 Vict. c. 110, a judgment creditor registering his judgment so as to give it the same effect as a charge in writing, has, notwithstanding the statute of Eliz., a valid charge upon the fruits of the benefice. On the other hand, notwithstanding that authority, the Court of Appeal has hitherto refused to give relief upon a motion for a receiver, although the case was brought under their attention. When I find that the Lord Chancellor has expressed an opinion so clear and strong as he has done in *Hawkins* v. *Gathercole* (*b*), if it were a definitive opinion it would be presumptuous and absurd in me to decide upon any principle adverse to it. But I am informed that the judgment of the Lord Chancellor in the case of *Hawkins* v. *Gathercole* is under review; and that his Lordship is called upon to re-consider it upon an appeal; I feel certain, therefore, that whatever opinion I

(*a*) See ante, p. 512, note (*a*).
(*b*) 1 Sim. N. S. 63.

pronounce here to-day on this question must be brought under the review of a higher Court. That being so, I consider that all I am now doing is merely stating my own individual opinion; and that opinion is, that it is my duty to refuse the relief asked by this bill.

I wish it to be distinctly understood, that it is only from the position in which this question stands before the Court as a question *sub judice* that I dismiss this bill; for it would be presumptuous and absurd in me to pronounce an opinion upon a matter finally settled by the judicial decision of the Lord Chancellor, which would be adverse to his decision. I desire to do no such thing; but feel bound simply to express my individual opinion, which will be subject to the control of the better opinion of the Court of Appeal.

I must dismiss the bill, but without costs, except that the plaintiffs must pay the costs of the Archbishop of Canterbury, who is a mere formal party.

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The case of *Hawkins* v. *Gathercole*, upon which the plaintiffs mainly relied, and the decision in which was commented on in the above judgment, was argued upon appeal to the Lords Justices on the 23rd, the 24th, and the 25th of November, 1854; and the Lords Justices delivered judgment on the 19th of January, 1855, reversing the judgment of Lord *Cranworth*, and affirming the principle on which the Vice-Chancellor decided the above case.

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*July 25th.*

## CLARK *v.* BROWNE.

A testator gave one-third part of the "amount of money" that might accrue from his claim on a testator's estate in course of administration in Chancery to his son, and the other two-third parts thereof to his wife and his son-in-law for their lives, with remainder to the son. The larger part of the amount was, after the date of the will, received by the testator under orders of the Court, and invested in his name in Consols, some small part of which he sold, but afterwards repurchased in part. The executrix, on the testator's death, treating this stock as the subject of the legacy, transferred the son's one-third to him, and she also transferred the two-third parts to trustees, who paid the income to her and the son-in-law:—*Held*, on the principle of the civil law, that the testator having set apart a specific fund received by him, in order that it may be expressly reserved for the benefit of the legatee, it was not adeemed.

*Held*, also, that the acts and course of dealing for a period of thirty-two years with the fund, as appropriated to answer the legacy, was a circumstance of great weight in rebutting the case of ademption, and the claim on the footing of a resulting trust.

THE plaintiff in this cause, Mr. George Clark, claimed that a specific legacy given by the will of Mr. Thomas Stringer had been adeemed by the testator in his lifetime, except as to a small part thereof; and that, as the personal representative of the surviving executrix and residuary legatee of Mr. Stringer, he had become entitled thereto.

Mr. Thomas Stringer, the testator, by his will dated the 3rd of March, 1812, gave one-third part of the amount of whatever sum or sums of money might arise and be received from his claim and demand on the estate and effects of the late Sir Charles Booth, deceased, to his (the testator's) son, Dr. Stringer; and he gave one other third part of such amount to Peter Locke and Joshua Sutting Crossley in trust for his daughter Mary Cuming for life, with remainder to her husband John Brompton Cuming for life, with remainder to their children, and in default of issue, with remainder to his son Dr. Stringer absolutely; and he gave the remaining third part of such amount to the same trustees in trust for his wife Rebecca Stringer, for her life, with remainder—as to one moiety, to his son Dr. Stringer absolutely—and as to the other moiety, in trust for his daughter Mary Cuming for life, with like remainders as were limited with respect to the one third part originally given to her; and he gave all the residue and remainder of his personal estate to his wife Rebecca Stringer absolutely, and appointed her and Mary Cuming his executrices.

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*Statement.*

The testator died on the 14th of November, 1822, and his daughter Mary Cuming died on the same day, a few hours before her father, without issue. The testator's wife, Rebecca Stringer, and his son, Dr. Stringer, survived him. Mrs. Rebecca Stringer, the widow, duly proved his will.

Mrs. Rebecca Stringer died in January, 1832, having by her will, dated the 15th of July, 1831, given all the residue of her personal estate to her sister Elizabeth Billingsley absolutely, whom she appointed executrix of her will. Miss Billingsley proved the will. Miss Billingsley, by her will, gave the residue of her personal estate to the plaintiff, George Clark, absolutely, and appointed him and another person executors of her will. The plaintiff alone proved the will of Miss Billingsley. He also obtained letters of administration cum testamento annexo of Mrs. Rebecca Stringer, to be granted to him on the 4th of July, 1845. The plaintiff thus became the sole legal personal representative as well of Mrs. Rebecca Stringer as of Miss Billingsley, and he was thus also beneficially entitled to the residue of their personal estates and effects.

Dr. Stringer, the son, died in the year 1832, and the defendant Mrs. Elizabeth Newling, widow, his daughter, became his personal representative.

The claim of the testator, Mr. Thomas Stringer, on the estate of Sir Charles Booth, deceased, was, that he was the personal representative and residuary legatee of one Thomas Jenkin, who was one of the next of kin of Sir Charles Booth, for the administration of whose estate a suit of *Walter* v. *Maunde* was, at the date of Mr. Stringer's will, in prosecution in the Court of Chancery,

Under an order in this suit of *Walter* v. *Maunde*, the sum of 5000*l.* Consols was transferred by the Accountant-General into the name of Mr. Stringer, the testator, in August, 1813, and in 1816 three other sums were so transferred, making altogether 11,250*l.* In September, 1813, Mr. Stringer sold 1000*l.* Consols, and in September, 1816,

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he sold a further sum of 400*l.*; but between the beginning of January, 1817, and the end of July, 1819, he purchased five sums of Consols, making together 550*l.*; and as the result of the above transactions the sum of 10,400*l.* Consols was standing in the name of the testator, Mr. Stringer, on the day of his decease.

Mrs. Rebecca Stringer, on the 3rd of February, 1823, transferred into the name of Dr. Stringer, the son, the sum of 3333*l.* 6*s.* 8*d.*, Consols. On the 6th of March, 1823, she transferred the sum of 6666*l.* 13*s.* 4*d.* Consols into the names of Peter Locke and Joshua Sutting Crossley (named as trustees of Mrs. Stringer's will), but no declaration of the trusts of this sum of 6666*l.* 13*s.* 4*d.* Consols was ever executed by the trustees. During the joint lives of Mrs. Stringer and Mr. Cuming, the trustees paid the dividends of the 6666*l.* 13*s.* 4*d.* Consols to them in moieties.

On the 3rd of June, 1823, a further sum of 856*l.* 8*s.* 9*d.* Consols was transferred to Mrs. Rebecca Stringer as executrix of her husband, in respect of the testator's claim upon Sir Charles Booth's estate, by the Accountant-General pursuant to an order made in *Walter* v. *Maunde*.

After the death of Mrs. Rebecca Stringer, in January, 1832, the then surviving trustee, Mr. Peter Locke, in February, 1832, transferred 1666*l.* 13*s.* 4*d.* Consols, part of the above sum of 6666*l.* 13*s.* 4*d.* Consols (being one-fourth part thereof), into the name of Dr. Stringer, the son. In March, 1832, the defendant Mr. George Browne, on the request of Mr. Cuming, consented to act as a trustee with Mr. Locke, and the 5000*l.* Consols were transferred into their joint names, but no declaration of trust was ever executed. Mr. Locke died, and Mr. Browne became and continued to be the sole trustee. The dividends of the 5000*l.* Consols were paid to Mr. Cuming until his death in July, 1851.

Under these circumstances, the plaintiff Mr. Clark, by his bill against Mr. Browne, the surviving trustee, in whose

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name the 5000*l.* Consols stood, and against Mrs. Newling as representative of Dr. Stringer, prayed a declaration that the plaintiff was entitled to the 5000*l.* Consols and the dividends thereon since the death of Mr. Cuming.

*Statement.*

The defendant, Mrs. Newling, claimed to be entitled to the whole of the 5000*l.* Consols, and the arrears of dividends since July, 1851.

*Argument.*

Mr. *Bacon* and Mr. *Speed*.—The gift of the testator's claim upon the estate of Sir Charles Booth was a specific legacy. The payment to the testator of so much of that amount as he received during his life destroyed pro tanto the subject-matter of the gift, and withdrew the amount from its operation;—it was an ademption to that extent of the legacy, and reduced the amount on which the gift operated to the sum of 856*l.* 8*s.* 9*d.* Consols, which remained and was paid to Mrs. Stringer after the testator's death. This principle has been uniformly adopted. Thus in *Fryer* v. *Morris* (*a*), a testatrix specifically bequeathed a debt due to her on a bond. She afterwards received part of the amount due, and placed the amount in the hands of her bankers, and withdrew 10*l.*, part thereof, and it was held that the legacy was adeemed.

The same rule was adopted in *Pulsford* v. *Hunter* (*b*) and in the following cases:—*Humphreys* v. *Humphreys* (*c*), *Barker* v. *Rayner* (*d*), *Ashburner* v. *M'Guire* (*e*), *Hambling* v. *Lister* (*f*), *Stanley* v. *Potter* (*g*), *Nelson* v. *Carter* (*h*), *Rider* v. *Wager* (*i*), and *Gardner* v. *Hatton* (*k*). The 5000*l.* became a fund undisposed of specifically, and resulted to the testator and passed, in the gift of the residue, to Mrs. Stringer, under whom the plaintiff claims.

(*a*) 9 Ves. 360.
(*b*) 3 Bro. C. C. 416.
(*c*) 2 Cox, 185.
(*d*) 5 Madd. 208.
(*e*) 2 Bro. C. C. 108.
(*f*) 1 Amb. 401.
(*g*) 2 Cox, 180.
(*h*) 5 Sim. 530.
(*i*) 2 P. Wms. 328.
(*k*) 6 Sim. 93.

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*Argument.*

[The VICE-CHANCELLOR.—Assuming your argument that the plaintiff is entitled to the amount as a resulting trust to be effectual, how do you account for Mrs. Stringer's transferring the 6666*l.* 13*s.* 4*d.* Consols in March, 1823, and Mr. Cuming receiving the dividends from that date to the time of his death?]

That was acquiescence by Mrs. Stringer in ignorance of her rights; but it is unnecessary for the plaintiff to account for this circumstance. It cannot be used as a presumption against the plaintiff. Lord Chancellor *Nottingham*, in *Cook* v. *Fountain* (*a*), says, "It is such a general rule as never deceives—a general rule to which there is no exception, and that is this: the law never implies, the Court never presumes, a trust, but in case of absolute necessity."

Mr. *Malins* and Mr. *Jolliffe* appeared for the defendant Browne, the trustee.

Mr. *Elmsley* and Mr. *Piggott* appeared for the defendant, Mrs. Newling.

The counsel for the defendants were not heard.

*Judgment.*

The VICE-CHANCELLOR:—

This plaintiff, who claims upon the principle of a resulting trust, has not satisfied me of his title. He says, that there was a specific legacy of a claim which the testator Thomas Stringer had against the estate of Sir Charles Booth, which was adeemed except as to an inconsiderable part.

There is no doubt on the doctrine of ademption, that, if the legacy be a specific debt, and if, after making the will, the testator receives the amount so as to extinguish the

(*a*) 3 Swanst. 585, 591-2.

debt, there is nothing upon which the words of the gift can operate.

If this were the case of a specific bequest of that kind, the plaintiff's case, as to ademption pro tanto, would be well founded. But the Court must look carefully to see whether the bequest is or is not made in terms so comprehensive, that, although the testator may in his lifetime have received satisfaction of the claim, the gift may extend to the fund in its altered state.

Sir *John Leach*, in the case of *Barker* v. *Rayner* (*a*), adverted to a principle derived from the civil law (*b*), that where a testator sets apart a specific fund received by him in order that it may be applied for the benefit of the legatee, the principle of ademption or extinction does not apply.

The words of the will give "one third part of the amount of whatever sum or sums of money may arise and be received from the testator's claim and demand on the estate and effects of the late Sir Charles Booth, deceased."

If the sums received by the testator under the orders of this Court had been mixed with the general mass of his property, there would have been more room for the argument in favour of extinction and ademption. But so far from thus mixing the amount received, he invested that amount as a separate fund in 3*l.* per cent. stock. It is a singular circumstance that he sold out small parts of this stock, and as to part of what he had sold out he repurchased stock; but it is certain that there remained at the time of his death the amount of stock originally invested, after deducting the small sums sold, but increased by the reinvestments which I have mentioned.

The benefit intended for the legatees was, according to

(*a*) 5 Madd. 208; *S. C.*, on appeal, 2 Russ. 122.
(*b*) Instit. lib. ii. tit. 20, s. 12.

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his language, the amount which might be recovered in respect of his claim.

One view of the case is, that it was a pecuniary legacy, the amount to be demonstrated by reference to a sum to be realised from a particular fund. If that be a correct view, the doctrine of ademption could not apply. But the appropriation by the testator of the amount received, so as to keep it separate from the rest of his estate, stamps upon the sum which is found thus appropriated a specific character as the fund destined by him to satisfy the bequest.

The principle of the civil law to which Sir *John Leach* alludes in *Barker* v. *Rayner*, has regard to the act of the testator in dealing with a specific subject, so as to preserve it for the legatees. That principle seems to me still more strongly to apply to this case, for there is little doubt as to what was the meaning of the testator as to the fund in the state in which it stood at the time of his death.

The strict construction of the testator's language makes it not a gift of the debt *quà* debt, but of the sum of money produced when the debt was recovered and ceased to exist as a debt. This goes to shew that the testator contemplated the recovery of the debt in his own lifetime, when the subject of the gift could not be the debt itself, but the amount recovered in respect of it.

Moreover, I cannot doubt that the executrix acted substantially upon the understanding, that the stock in which the testator had invested what he had recovered from the estate of Sir Charles Booth, or so much as remained at the time of his death, was really the subject of the gift in the will. For a period of thirty-two years, since the death of the testator, the stock has been standing in the name of a trustee, who, by a mesne act and not by a direct act of Mrs. Stringer, has been in possession of it for a number of years, and still holds it upon the title of the person who would have enjoyed it if it had been included in the gift in Mrs.

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Stringer's will. He received the proceeds of the stock during this length of time up to the year 1851, and applied them to purposes quite consistent with the bequest.

The plaintiff now asserts, by this bill, a title to the fund in the hands of the trustee, on the ground that the legacy was adeemed, and upon the footing of a resulting trust.

Being claimed as a resulting trust, such a claim is liable to be rebutted by evidence; and here the evidence of the acts of the testator and the course of dealing with the fund go to rebut the resulting trust, and to fasten upon the fund that character in which it is claimed by the legatee and impressed with a trust for his benefit.

The bill must be dismissed, but without costs.

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Another cause of *Newling* v. *Browne* then came on to be heard, in which Mrs. Newling claimed the 5000*l.*; and a decree was made in that suit, giving the whole fund, with the arrears of dividends, to Mrs. Newling.

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## BAKER *v.* BRADLEY.

*March 27th.*

THIS bill was filed on the 15th of May, 1852, by William Baylis Baker, in order to obtain a declaration that two indentures of mortgage, dated the 2nd of December, 1848, and purporting to secure the sum of 1300*l.* and 500*l.*, and a third indenture, dated the 24th of October,

A son, entitled in remainder to real estate expectant on the lives of his mother and father, by whom he was maintained, a few days after he attained twenty-one, in order to relieve his parents, who had mortgaged their life interest as a security for monies borrowed and partly expended in improving the property, from keeping on foot certain life policies, executed a deed charging the inheritance with the mortgage debt, but subsequently filed a bill claiming to have the deeds cancelled on the ground of fraud, which was disproved, and of undue influence:—Bill dismissed with costs.

The reported decision in *Field* v. *Evans*, 15 Sim. 375, ascertained to be erroneous.

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1850, to secure 700*l.*, had been improperly obtained; and that the two former deeds might be declared absolutely void, and delivered up to be cancelled; and that the indenture of the 24th of October, 1850, might be declared to be a good security as against the plaintiff for only so much as on taking the account might be found at the date of the deed to have been justly due from the plaintiff to the defendant Thomas Lovegrove. William Baylis, late of Painswick, gentleman, by his will, dated the 25th of August, 1835, gave certain messuages and hereditaments, of which he was seised, to Thomas Clutterbuck Croome, as follows:—"To hold the same to the said Thomas Clutterbuck Croome, his heirs and assigns, for ever, to the use of and in trust for my said daughter Ann Baker and her assigns, for and during the term of her natural life; and to permit and suffer her to receive the rents and income to arise therefrom during the term of her natural life, separate and apart from her present or any future husband, and not subject to his debts, engagements, or control; and I declare that the receipts of my said daughter Ann Baker alone, or of some person or persons authorised by her to receive any payment of the said rents and income, after such payment shall have become due, notwithstanding her said present or any future marriage, be good discharges for the said rents and income, or for so much thereof as shall be thereby acknowledged to have been received. And from and immediately after the determination of the estate hereinbefore limited to the use of and in trust for the said Ann Baker for her life, as aforesaid, then to the said T. C. Croome and his heirs during the natural life of my said daughter, in trust, to support the contingent uses and estates hereinafter limited, yet to permit and suffer the said Ann Baker to receive and take the rents and income to arise from the said hereditaments during the term of her natural life as aforesaid; and from and immediately after the decease of the said Ann Baker, then to the use

of and in trust for the said Charles Baker, if he shall survive the said Ann Baker, for and during the term of his natural life, to enable him to support himself, and to support and bring up the children of the said Ann Baker; and in case the said Charles Baker should die in the lifetime of the said Ann Baker, and if she should marry any future husband who should happen to survive her, then to the use of and in trust for any future husband of the said Ann Baker who may happen to survive her, for and during the term of his natural life; and from and immediately after the decease of the survivor of them the said Ann Baker and the said Charles Baker, and of any future husband of the said Ann Baker, if such future husband shall survive her, then to the use of all and every or any one or more of the children, grandchildren, or other issue of the said Ann Baker by the said Charles Baker or by any future husband, such grandchildren issue (*a*) to be born before any appointment shall be made to them respectively, in such manner and form, and if more than one in such parts, shares, and proportions, and with such limitations over or substitutions in favour of any one of the others of the said children, grandchildren, and issue respectively, and at such time or times, age or ages, day or days, and in such contingencies, and under and subject to such directions and regulations for maintenance, education, and advancement, and to such conditions, as the said Ann Baker, notwithstanding her present or any future husband, at any time or times and from time to time by any deed or deeds, to be signed, sealed, and delivered by her in the presence of two or more credible witnesses, to be with or without power of revocation and new appointment, or by her last will and testament in writing, or any writing in the nature of a last will and testament, or any codicil or codicils to be respectively signed and published by her in

(*a*) *Sic* in original.

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the presence of and attested by three or more credible witnesses, shall direct, limit, or appoint, or give and devise the same; and from and until default of, and from time to time and subject to such direction, limitation, and appointment, gift, or devise, then to the use of and in trust for the child of the said Ann Baker, if only one, whether male or female, and for all the children of the said Ann Baker both male and female, if more than one, and whether by her present or any future husband, to be equally divided between or among them, share and share alike, as tenants in common and not as joint tenants, and the heirs of the body and several and respective bodies of the same children respectively lawfully issuing, with cross remainders in tail between and among such children of the said Ann Baker; and in default of such issue, then to the same uses, upon the same trusts, and for the same estates as are hereinafter devised to the said T. C. Croome, to the use of and in trust for my daughter Mary Baylis and her children, and the issue of such children; and in default of issue of all the children of the said Ann Baker and of the said Mary Baylis, then to the use of and in trust for the said Ann Baker, her heirs, &c., absolutely.

The testator then devised other estates to his daughter Mary Baylis upon similar trusts, and in default of children of the said Mary Baylis, then on the same trusts in favour of Ann Baker and her children, and, failing children of Ann Baker, to Mary Baylis absolutely. He appointed Ann Baker and Mary Baylis executrices of his will.

The testator died soon after the date of the will, leaving no debts, and his will was proved by his executrices. Immediately on the testator's decease in 1837, Ann Baker, and her husband Charles Baker, entered into possession of the devised estates, and into the receipt of the rents and profits. In 1842, Baker, the elder, having expended considerable sums of money in improving the property, became embarrassed in his circumstances, and applied to Mr. Clut-

terbuck, who had acted as his solicitor for a period of fifteen years, to negotiate for him a loan on the security of his own life interest and that of his wife in the property. Mr. Clutterbuck, with a view to effect the loan, entered into negotiation with one Thos. Carter, for the loan of 1000*l.* on such security, and obtained from Mr. Baker a copy of the testator's will, which he transmitted to counsel, in order to settle the deeds.

On the 12th of February, 1842, by an indenture of the same date, between Charles Baker and Ann, his wife, of the one part, and Thos. Carter of the other part, it was witnessed, that, in consideration of 1000*l.* to the said Chas. Baker paid, and in consideration of 5*l.* to the said Ann Baker paid, by the said Thos. Carter, the said Chas. Baker and Ann, his wife, did grant, bargain, sell, alien, release, and confirm unto the said Thos. Carter and his heirs, all and singular the messuages, mills, lands, tithes, and hereditaments and premises, whatsoever and wheresoever, whether freehold or copyhold, or of any other tenure or nature whatsoever, mentioned, or given and devised in the will of the said Wm. Baylis, and expressed or intended so to be, to hold the said messuages and hereditaments, expressed to be firstly devised by the will of the said William Baylis, unto and to the use of the said Thos. Carter, his heirs and assigns, for the term of the natural life of the said Ann Baker, and after her death, for and during the natural life of the said Charles Baker, and after the death of the survivor of the said Charles Baker, and Ann, his wife, and of any other husband she might marry, and failure of issue, unto and to the use of the said Thos. Carter, his heirs and assigns, to hold the said messuages and hereditaments, expressed to be secondly devised by the will, to the use of the said Thomas Carter, his heirs and assigns, from and after the death of the said Mary Baylis, and of any husband of the said Mary Baylis, and the failure of her issue, during the natural life of the said Charles Baker, but

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subject to the proviso for redemption therein contained. The sum of 1000*l.* was further secured by a policy for 1000*l.* on the life of the said Chas. Baker.

The deed omitted to recite that clause in the will, by which it was declared that the receipts of the testator's daughter Ann Baker alone, or of some person or persons authorised by her to receive any payment of the said rents and income, after such payment shall have become due, should also, notwithstanding her present or any future marriage, be good discharges for the said rent and income, or for so much thereof as should be thereby acknowledged to have been received.

Charles Baker paid some sums on account of the principal and interest, whereby the mortgage was somewhat reduced; but, being again in want of funds, he applied to Mr. J. Lovegrove for a loan. After some negotiation, the latter having obtained from Clutterbuck, who acted as Charles Baker's solicitor, a copy of the will, and of the mortgage deed, which had been delivered to Carter, agreed to lend 500*l.* on the said security; and, by an indenture, dated the 28th November, 1842, between Charles Baker and Ann his wife of the first part, and John Lovegrove of the other part, it was witnessed, that, in consideration of 500*l.* paid to Charles Baker, and 5*l.* to his wife, the said Charles Baker and Ann his wife did grant, bargain and sell, and release to the said John Lovegrove all the messuages comprised in the indenture of the 12th of February, 1842, to hold the same unto and to the use of the said John Lovegrove, his heirs and assigns, &c. &c., subject to the proviso for redemption. This deed was prepared, settled, and approved by Mr. Clutterbuck on behalf of Charles Baker, and by a Mr. Lambe on behalf of Lovegrove. The rest of the will was copied from Carter's deed, and, like the original, omitted to set out the receipt clause by Mrs. Baker.

Immediately after the execution of the deed, Lovegrove gave notice thereof to T. C. Croome, the trustee under the

will. In 1843, a judgment at law was recovered by Carter on his mortgage, and a writ of fi. fa. issued, on which a levy was made; but a bill of sale for the sum of 408*l.* 10*s.* 6*d.* was ultimately taken by Carter. Charles Baker, thereupon, through Mr. Lambe, who was then acting as his solicitor, applied to Lovegrove to negotiate for him the loan of 1100*l.* upon the security of the life estate of himself and his wife under the testator's will. The defendant, Bradley, through Lovegrove, who then acted on his behalf, agreed to make the loan; and the deed of the 1st of May, 1844, was prepared by Mr. Lovegrove, Mr. Clutterbuck acting for Carter.

The deed was laid before a gentleman at the bar, of considerable standing and experience, practising in Gloucester, and a full and accurate copy of the testator's will accompanied the instructions; but the receipt clause by Mrs. Baker was again omitted in the draft. The deed, after reciting the previous loan by Carter, and the bill of sale of the goods, &c., witnessed, that, in consideration of 591*l.* 9*s.* 6*d.*, thereby acknowledged to be paid to Carter by Bradley, and 408*l.* 10*s.* 6*d.* to Charles Baker, making together 1000*l.*; the said C. Baker and Ann his wife did thereby convey to the said Bradley the said hereditaments, subject to the proviso for redemption on payment of 1000*l.* The said deed also contained a provision for keeping up the policy on the life of the survivor of the said Charles Baker and Ann his wife, and for charging the expenses thereof on the said mortgaged premises as therein mentioned.

By the same instrument the goods were assigned to secure a further sum of 100*l.*

On the occasion of the execution of the deed, Charles Baker stated that he had expended upwards of 1000*l.* in improvements on the property; and that, as his son, the present plaintiff, would have the benefit of such expenditure, he thought he ought to join him in the security.

On the 28th of March, 1848, John Lovegrove died, and

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his will was proved by his executors, T. C. Adams, J. Lovegrove, and Wm. Cother, Jun., defendants to this suit.

After the execution of the mortgages, Charles Baker and his wife continued in possession of the rents and profits, and generally, but with some irregularity, kept down the interest on the mortgage and paid the premiums, amounting to the sum of 80*l.* per annum.

Charles Baker with difficulty paying the premiums on the policy, it had been suggested, that his son should join him in charging the debt upon the estate, so as to relieve him from the necessity of keeping on foot the policies. The following entries appeared in the books of the executors of J. Lovegrove for bills of costs against Charles Baker.

"1848, April 15.

"Perusing mortgage to Mr. John Lovegrove, when I found (*a*) that your son, who appeared to be of age, should execute a charge upon his interest, or the money called in.

"Attending Mr. Bradley, who desired that his securities should also be confirmed by your son, and informed him I had already written you on the subject.

"May 5. Attending you as to the payment of premiums on policy held by Mr. Bradley, when you said you would discontinue it, as your son became of age on the 25th inst., and would concur in the mortgage, and requested me to ascertain what the office would give for the policy on surrender."

On the 24th of May, 1848, Charles Baker sent to the defendant Lovegrove the following letter:—

"Painswick, 24th May, 1848.

"Dear Sir,—I have written to Mr. Bradley to say that it is my intention to go to Gloucester next Tuesday, for the

(*a*) *Sic* in original.

purpose of arranging and completing the mortgage, when my son will join. I have named half-past ten at your office. "Yours truly,

"J. Lovegrove, Esq., Gloucester. "CHARLES BAKER."

The plaintiff became of age on the 25th of May, 1848; he had always lived with his parents, and had been maintained by them.

On the 30th of May, 1848, a memorandum or undertaking was signed by the plaintiff in the presence of the defendant Lovegrove, which recited that William Baylis Baker, under the will of the testator, after the decease of his mother and any husband she might leave surviving, subject to a power of appointment, was entitled to certain hereditaments therein comprised, and also to those devised to the said Mary Baylis, and reciting the indenture of the 28th of November, 1842 (Lovegrove's mortgage, and also the indenture of the 11th of May, 1844, Bradley's deed), and reciting the loan of 1000*l.* upon the bill of sale, and that 500*l.* was now due to the executors of the said Lovegrove, and 1100*l.* to the said Bradley, and that a large proportion of the above sums had been applied by the said father and mother of the said plaintiff in the maintenance and education and advancement in life of him the said William Baylis Baker, as he did thereby admit and acknowledge. The memorandum then proceeded as follows:—

"Now he the said William Baylis Baker doth hereby undertake, promise, and agree to and with the said J. C. Adams, Joseph Lovegrove, and William Cother the younger, and the said J. Bradley respectively, that he the said W. B. Baker will, whenever thereunto requested by them the said T. C. Adams, J. Lovegrove, and W. Cother the younger, and J. Bradley, or any or either of them, at his own costs and charges make, do, execute, and perfect all such acts, deeds, and assurances as may be deemed necessary for securing to

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them respectively all their respective executors, administrators, and assigns, the repayment of the said several principal sums so respectively due as aforesaid, together with all interest now or hereafter to become due upon the same sums respectively. And for such purpose to convey and assure to them respectively and to their respective heirs, executors, administrators, and assigns, all his estate and interest whatsoever under the said will, and under any demise, limitation, or appointment which has already been made or may hereafter be made by his said mother under or by virtue of the power or authority to her for that purpose given in and by the said will; and also all the estate and interest which he the said W. B. Baker may hereafter become entitled to under the said will by reason of survivorship or otherwise; the said T. C. Adams, J. Lovegrove, and W. Cother the younger, and the said J. Bradley, to take as to priority according to the dates of their several mortgages; and the said W. B. Baker doth hereby further undertake, promise, and agree, that in case the said T. C. Adams, J. Lovegrove, and W. Cother the younger, and the said J. Bradley, should desire it, he the said W. B. Baker will at his own costs and charges, and as soon as may be, raise, borrow, or make, do, and execute all necessary acts, deeds, and assurances for the purpose of raising or borrowing upon security of the hereditaments and premises aforesaid, such sum or sums of money as shall be requisite and necessary for paying to the said T. C. Adams, J. Lovegrove, W. Cother the younger, and J. Bradley respectively, all principal and interest monies which may be due to them respectively on the before-mentioned securities.

"Dated this 30th day of May, 1848. W. B. BAKER.
"Witness, J. LOVEGROVE."

The following entry was extracted from the books of Mr. J. Lovegrove :—

"May 30, 1848.

"Attending upon your son and consulting, when it was agreed that Mrs. Baker should appoint the whole of the property in fee to Mr. W. B. Baker, and he agreed, either to execute a deed, charging his interest in the property with the money advanced by Capt. Bradley and Mr. J. Lovegrove, or to raise a sufficient sum to pay them off; and taking instructions to prepare undertaking to that effect.

"Drawing undertaking, folios 13.

"Making fair copy thereof.

"Attending your son, reading over same to him, and witnessing his signature thereto."

After the execution of the said memorandum, it was suggested that the policies should be continued for a short time longer, in order to obtain better terms on the surrender. This proposal elicited the following letter from Charles Baker.

"Painswick, 18 Aug., 1848.

"Dear Sir,—I should have said more to you yesterday respecting the life policies, but was prevented from doing so in consequence of your engagements, and your hurry to get to the train. My son says, that, as the sole object of his joining in the securities was to entirely do away with both the policies, for the purpose of giving us a better income, he fully expects they will be both given up, otherwise he will not sign the deed; and you will please therefore act accordingly. Yours truly,

"CHARLES BAKER."

Mr. Cother, who was at the bar, and practised as a conveyancer in Gloucester, had been employed by Mr. Lovegrove, on behalf of all parties, to prepare the necessary deeds, but suggested that in order to better the plaintiff's

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title under the will, and through him the title of the mortgagees, an absolute appointment should be made by Mrs. Baker in favour of the plaintiff in fee simple, and this suggestion was adopted. Mr. J. Lovegrove, the drafts having been prepared, being anxious that the son should understand the nature of the transaction, on the 21st of August, 1848, addressed the following letter to Charles Baker.

"Dear Sir,—I don't think there will be any objection upon the part of my co-executors to allow the policy of insurance to drop; but, as it will not expire before Christmas, it must be noticed in the deeds, in case anything should happen to you before that time. I did not clearly understand from you, whether your son had perused the drafts of the deeds I gave you on Wednesday last. If he has not, and you will give me a line, I will either send them to him, or he can come down and see them here; but, before they are engrossed, I should like to hear from you upon the subject. If he dispenses with the perusal, I think he ought to write to me to that effect. Your letter to me is dated the 18th, but it was not delivered until this morning, and I thought had the appearance of having been opened.

"Yours truly,

"Gloucester, 21 Aug., 1848. "JOSEPH LOVEGROVE."

"Charles Baker, Esq."

On the 26th of the same month, the plaintiff and his father called at the office of Mr. Lovegrove, who explained to them the purport and effect of the said drafts. The plaintiff stated that he had read over the draft of the proposed confirmation and security to the defendant J. Bradley, being that of the first of the deeds, dated the 2nd of September, 1848. Mr. Lovegrove thereupon wrote a memorandum on the said draft, to the following effect:—

"August, 1848.

"We have perused this draft, and approve of its contents.

"CHARLES BAKER,

"W. B. BAKER."

Mr. Lovegrove then read over to the plaintiff and his father the second deed of the 2nd of September, viz. the deed of confirmation to Lovegrove's executors; and having heard it read, the following memorandum was indorsed thereon, which was signed by C. Baker and the plaintiff:—

"August, 1848.

"We have heard this draft read, and approve of its contents.

"CHARLES BAKER,

"W. B. BAKER."

Mr. Lovegrove then proposed that they should take the drafts to some solicitor, which they declined doing. On the 24th of August, the plaintiff and his father called on Mr. Bradley and induced him to lend a further sum of 200*l.* on the property, which he did by a cheque for that amount, and the drafts were accordingly altered.

A full copy of the testator's will was laid before Mr. Cother, with the instruction to prepare the deeds of appointment and confirmation; but the recitals were again copied from the mortgage deed to Carter, omitting the receipt clause by Mrs. Baker. On the 2nd of September, Mrs. Baker executed the deed of appointment, which, reciting the power, and that Mary Baylis had intermarried with James Holder, since deceased, and was then unmarried and without issue, appointed the demised estates unto and to the use of the plaintiff in fee simple.

On the 2nd of September, 1848, the two deeds were executed between Charles Baker and Ann his wife, of the first part; William B. Baker, of the second part; and John Bradley, of the third, reciting the will of the plaintiff, and

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the memorandum of the 30th of May, 1848; the said William B. Baker admitting that the sum of 1000*l.* was then due to the said John Bradley, and 500*l.* to the executors of the said John Lovegrove from the said Charles Baker and Ann his wife, together with a further sum of 100*l.* lent by the said J. Bradley to the said Charles Baker, and reciting that a large proportion of such monies had been applied by the said Charles Baker and Ann his wife in the maintenance, education, and advancement in life of the said William B. Baker, the said plaintiff did thereby undertake and promise to and with the said T. C. Adams, J. Lovegrove, and W. Cother, and the said John Bradley, respectively, that the said plaintiff would, whenever thereunto requested by them or either of them, at his own costs and charges, make, do, execute, and perfect all such acts, deeds, and assurances as might be deemed necessary for securing to them and their executors, &c., in repayment of the said principal sums of 500*l.* and 1100*l.* so due to them as thereinbefore stated, and interest thereon, and for such purpose to convey and assure to them, their heirs, executors, administrators, and assigns, all his estate and interest under the said will, and under any direction, limitation, or appointment which had then already been made or might hereafter be made by his said mother, given her under the testator's will, and all the estate to which either might be entitled by survivorship, reciting that it was arranged that the said mortgagees should take according to priority. It was thereby witnessed, that, in consideration of the sum of 200*l.* paid by the said John Bradley to the said Charles Baker and to the plaintiff, the said Charles Baker did covenant for the repayment of the same, and also that the estate of himself and his wife under the testator's will should be charged therewith. And it was by the then stating indenture further witnessed, that in pursuance of the said agreements, and in consideration of the premises, the said William B. Baker did by those presents grant, convey, assign,

and confirm unto the said defendants, John Bradley, his heirs, &c., all and singular the estates devised under the testator's will, including those firstly given to the said Ann Baker, and those secondly given to the said Mary Baylis; and all the estate and interest of the plaintiff comprised in the deed of appointment of the 1st of September, 1848, to hold all and singular the said premises, to secure the said sums of 1000*l.*, 100*l.*, and 200*l.*, making together 1300*l.*

The deed contained the usual covenant, that the plaintiff would pay the said sum and interest, and a power of sale. A similar deed of even date was executed by Charles Baker and his wife, and W. B. Baker, in favour of the executors of Joseph Lovegrove, to secure the sum of 500*l.*

The receipt clause by Mrs. Baker was again omitted in both deeds.

Shortly after the execution of the deeds the policies were dropped; but on the 4th of November, 1848, the plaintiff employed Mr. Clutterbuck to obtain for him a loan of 300*l.*, which that gentleman succeeded in obtaining through the defendant Lovegrove from Miss Taylor, one of his clients. A deed was prepared, again omitting the receipt clause by Mrs. Baker, and executed between the plaintiff and Miss Taylor, by which the sum of 300*l.* was secured upon the estates comprised in the testator's will.

In December, 1849, Mr. Croome, having been applied to by Mr. Lovegrove, replied by a letter in which was contained the following passage :—

"I entertain doubts, in common with professional men who have seen the will, of Mrs. Baker's power to charge or assign her life interest, and as a necessary consequence of my power to recognise it. There are many conflicting decisions."

In consequence of this suggestion it was arranged that a case should be laid before counsel, in order to ascertain whether Mrs. Baker had authority to charge her life

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estates. A case was accordingly prepared; and the opinion of counsel taken, which was to the effect that Mrs. Baker was incapacitated from alienating her life interest. The result was, that a project, then on foot, to raise a sum of 2600*l.*, to pay off all the creditors, failed. The plaintiff at this time was indebted to several persons, and among others to the defendant Lovegrove, for sums of money advanced to him, and the creditors of Charles Baker were also importunate for payment of their debts. Under these circumstances the plaintiff and his father and mother applied to the defendant Lovegrove, assuring him that no advantage would be taken of the clause against anticipation, but that the defendant should have authority from Mrs. Baker to receive the rents and profits, in order to keep down the interest on the proposed mortgage, as well as on the existing securities. The defendant Lovegrove with some hesitation finally consented to advance such a sum as would extricate them from their difficulties, on condition, *inter alia*, that his bill of costs should be secured on the said estates. Mrs. Baker, in pursuance of the arrangement, addressed to Mr. Croome, the trustee under the will, a letter acknowledging that the rents had been hitherto received by her husband with her full sanction, and concluding thus:—

"I request you not to interfere in the receipt of the rents and income, or in the management of the said hereditaments and premises, unless and until I shall give you a request in writing."

By an indenture, dated the 24th of October, 1850, between Charles Baker and Ann his wife of the first part, the plaintiff of the second part, and the defendant Joseph Lovegrove of the third part, it was witnessed, that, in consideration of 700*l.* paid to the plaintiff and the said Charles Baker and Ann his wife, the plaintiff and the said

Charles Baker did jointly and severally grant, assign, and convey unto the said defendant Joseph Lovegrove, his heirs and assigns, all and singular the messuages and hereditaments devised by the will of the said William Baylis, as comprised in and appointed under the deed poll of the 1st of September, 1848, to hold, &c., &c., the same unto the said Joseph Lovegrove and his heirs, to the use of the said Joseph Lovegrove and his heirs for ever, and also the premises secondly expressed to be devised to Mary Holder to and for the use of the said Joseph Lovegrove and his heirs for ever. The deed contained a covenant by the plaintiff to pay the 700*l.* with interest, and was also acknowledged by Mrs. Baker. Upon the execution of the deed a settlement of account took place between the parties, upon which it was stated that the plaintiff owed Joseph Lovegrove 380*l.* 3*s.*, and Charles Baker owed him 270*l.* 19*s.* 4*d.*, thus leaving a balance of 48*l.* 17*s.* 7*d.*, which sum Joseph Lovegrove paid to the plaintiff.

The plaintiff subsequently filed this bill, alleging, that in the abstracts of the will of William Baylis, made with a view to the deeds of the 2nd of September, 1848, the proviso against anticipation by the said Ann Baker, as well as the similar proviso against anticipation by Mary Baylis, were entirely omitted in the said abstract; and that there was nothing on the face of such abstract to cause any suspicion that the original will of the said William Baylis did, in fact, contain any such proviso against anticipation, or that the said Ann Baker was in any way restrained and prevented from executing valid and effectual discharges upon her life estate under the said will.

"The plaintiff is advised and humbly submits, that such omission was a fraud upon the plaintiff, and that, by reason of the youth and inexperience, and want of legal advice, and also of the parental control exercised over him with the full knowledge and concurrence of the defendants, and also by reason of such fraud, the two indentures of the 2nd of

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*Statement.*

September, 1848, ought to be declared null and void, and decreed to be delivered up to be cancelled, so far as the plaintiff may be affected: and also by reason of the matters hereinbefore alleged, and also by reason that the indenture of the 24th of October, 1850, was a security for costs and for monies alleged to have been advanced to him to the extent of 380*l.* 3*s.* 1*d.*, and being a charge for 700*l.* and interest instead of the sum due from the plaintiff as arranged and understood at the time of the execution thereof, ought to be declared a valid security only for such monies as at that time were justly due from the plaintiff to the defendant Joseph Lovegrove." The bill in several passages repeated the charge of fraud, and also alleged "that, as the defendants John Bradley, T. C. Adams, and Wm. Cother were jointly employed and retained by the defendant Joseph Lovegrove, for the purpose of deceiving and misleading the plaintiff as to the true tenor of the testator's will, and also jointly profited by such deceit, they have no right to complain that they are joined as defendants in a suit instituted to set aside such security.

*Argument.*

Mr. *Elmsley* and Mr. *Hoare* for the plaintiff.—There were two questions for the Court to determine, first, whether there had been undue influence exercised over the plaintiff, so as to induce him to execute the deeds which charged the inheritance; and, secondly, supposing the case of undue influence failed, whether the plaintiff's mother was not restrained from incumbering her life estate, in which case the consideration for the deed would fail, and the plaintiff on that ground be entitled to relief.

The rule of the Court on the subject of undue influence was clearly laid down by Lord *Langdale* in the case of *Archer* v. *Hudson* (*a*), "If there be a pecuniary transaction between a parent and a child, just after a child attains

(*a*) 7 Beav. 560.

twenty-one, and prior to what was called complete emancipation, without any benefit moving to the child, the presumption is, that an undue influence has been exercised to procure that liability on the part of the child; and it is the business and duty of the party who endeavours to maintain such a transaction, to shew that that presumption was adequately rebutted." Every word of that judgment was applicable to this case. Here the whole scheme was contrived before the son had attained twenty-one, and was accomplished only five days afterwards. He was then resident with his father and under his influence, and being in such a position he incurred liabilities for the father's benefit, without receiving from him any consideration. The defendant, who had the benefit of the act of the son, was bound to shew that the transaction is righteous, and that the son voluntarily and deliberately did the act, knowing its nature and effect: *Cooke* v. *Lamotte* (*a*), *Hoghton* v. *Hoghton* (*b*). It would be contended, that in this case the father's debts, from which it was sought by this transaction to relieve him, were incurred, at least in part, in improving the property, and so far in benefiting the son; but, even that would not sustain the transaction as between the son and the father, *Carpenter* v. *Heriot* (*c*), or between the son and a stranger, *Huguenin* v. *Baseley* (*d*). [The VICE-CHANCELLOR.—In *Wycherley* v. *Wycherley* (*e*), Lord *Northington* explains the ground of his decision in *Carpenter* v. *Heriot* to be, that, where a father purchases anything for his son, it shall be taken as an advancement, and not as a loan.] Where parental influence was used by a father against the interest of the son, very slight evidence was required to induce the Court to relieve against it. In *Wallace* v. *Wallace* (*f*) Lord *St. Leonards* cited with approval, and adopted, the lan-

(*a*) 15 Beav. 234.
(*b*) Id. 278.
(*c*) 1 Eden, 338.
(*d*) 13 Ves. 105.
(*e*) 2 Eden, 180.
(*f*) 2 Dr. & War. 469.

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guage of Lord *Hardwicke* in *Heron* v. *Heron* (*a*). "Suppose the plaintiff," said Lord *Hardwicke*, "had been entitled to a tenancy in tail of real estate, and that the father, a bare tenant for life, had taken advantage of the son's necessities, to draw him in to join in any conveyance which would destroy his remainder, the Court, upon very slender evidence of such practice in the father, has relieved the son." In *Maitland* v. *Backhouse* (*b*), which was a case of guardian and ward, the Court restrained third persons from suing upon a security which the guardian had obtained from his ward. The Vice-Chancellor, in giving judgment (*c*), said, "that one of the most valuable parts of the jurisdiction exercised by this Court is that, by which it inquires into transactions between persons who have been placed in such a situation with regard to others as that they must have acquired influence over them, and by which it prevents such persons from using that influence for their own advantage, and to the detriment of those whom they ought to protect." This was nothing more than had been decided by Lord *Eldon* in *Hatch* v. *Hatch* (*d*).

Here there was no expression by the son of a desire to benefit his father; which made this a stronger case than *Hoghton* v. *Hoghton*, where such expression existed. All the son did was to accede to the plan previously proposed by the father, to whom the drafts of the deeds had been transmitted for approval. There was, therefore, a mere acquiescence by the son on the suggestion of the defendants, which it was clear could not be sustained: *Wood* v. *Downes* (*e*). That there was pressure upon the father, that the mortgage money would be called in unless the son executed the deed, so as to compel the father to exercise undue influence, is established by the evidence.

Again, the transaction was entered into by the son un-

(*a*) 2 Atk. 160.
(*b*) 16 Sim. 58.
(*c*) Id. 63.
(*d*) 9 Ves. 292.
(*e*) 18 Ves. 120—129.

der a mistake, to which the defendants were accessary, and was therefore invalid: *Cocking* v. *Pratt* (*a*), *Gordon* v. *Gordon* (*b*), *Wallace* v. *Wallace* (*c*). If Mrs. Baker's life interest was unalienable, there was clearly no consideration to the son. It was true that in one case, viz. that of *Kinchant* v. *Kinchant* (*d*), the absence of consideration was held insufficient to annul the transaction, but that decision was disapproved of by Lord *Alvanley* in *Brown* v. *Carter* (*e*).

The position of the son was that of a surety, and he was, therefore, entitled to the benefit of all the securities held by the principal, viz. the life interest of Mrs. Baker: *Pidcock* v. *Bishop* (*f*), *Stone* v. *Compton* (*g*).

Secondly, it was submitted that Mrs. Baker was restrained from anticipation: *Field* v. *Evans* (*h*), which, but for the word "assigns," was identical with this case. It was settled that no particular form of words was necessary to restrain anticipation: *Brown* v. *Bamford* (*i*); although there must be a clear indication of intention: *Tullett* v. *Armstrong* (*k*). In this case there were the negative words in the receipt clause, which the Vice-Chancellor of *England* thought necessary in the case of *Medley* v. *Horton* (*l*); though where there was a general intention apparent to restrain anticipation, even these words were unnecessary: *Harrop* v. *Howard* (*m*).

The defendant Lovegrove took the security for 700*l.* described as money advanced, but really in part costs, and never communicated to the plaintiff that his mother's interest was restrained from anticipation; but, "where, on a negotiation between two parties, one of them induces the other to contract on the faith of representations made to

(*a*) 1 Ves. sen. 400.
(*b*) 3 Swanst. 467.
(*c*) 2 Dr. & War. 469.
(*d*) 1 Bro. C. C. 369.
(*e*) 5 Ves. 873.
(*f*) 3 B. & C. 605.
(*g*) 5 Bing. N. C. 142.
(*h*) 15 Sim. 375.
(*i*) 1 Ph. 620.
(*k*) 4 M. & C. 377.
(*l*) 14 Sim. 225.
(*m*) 3 Hare, 624.

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him, any one of which has been untrue, the whole is in that case considered as having been fraudulently obtained:" *Reynell* v. *Sprye* (*a*).

The cases of *Moore* v. *Moore* (*b*), *Harnett* v. *M'Dougall* (*c*), *Willan* v. *Willan* (*d*), were also cited.

Mr. *Elderton* appeared for Mr. and Mrs. Baker, but took no part in the argument.

Mr. *Wigram* and Mr. *Selwyn* for the defendant Bradley.

Mr. *Malins* and Mr. *Forster* for the defendant Lovegrove.

Mr. *Bacon* and Mr. *Rogers* for other defendants.

The foundation of the plaintiff's case is, that Mrs. Baker was restrained from anticipation, because, if that fail, he must rely on the allegation of undue influence, which he has not proved.

The only authority that can be adduced to sanction the construction that the words of the will operate as a restraint on anticipation is the case of *Field* v. *Evans* (*e*); but the papers had been obtained in that case, from which it was clear that no such decision could have been pronounced. In *Barrymore* v. *Ellis* (*f*), the words were, "on trust to pay to such persons as Lady Barrymore should by any writing signed by her appoint, but so as not to deprive herself of the benefit thereof by sale or other anticipation;" but she was held to have general uncontrolled dominion over the annuity. In *Brown* v. *Bamford* (*g*), which had been cited, the Lord Chancellor held, on words somewhat similar, that anticipation was restrained, but guarded himself against being sup-

(*a*) 1 De G., Mac., & G. 660.
(*b*) 1 Coll. 54.
(*c*) 8 Beav. 187.
(*d*) 16 Ves. 216.
(*e*) 15 Sim. 375.
(*f*) 8 Sim. 1.
(*g*) 1 Ph. 626.

posed to overrule *Barrymore* v. *Ellis;* but even if that case were carried to the fullest extent, it amounts only to this, that where in any part of the instrument creating the trust you find a clear indication of intention against anticipation it is sufficient. The case that most nearly resembled this was *Acton* v. *White* (*a*), where the rents of real estate were made payable by the testator into the hands of his wife, and not otherwise, for her life, for her separate use; and it was directed that the receipts of the wife alone, for what should actually be paid into her own proper hands, "should be good discharges to his trustees." In that case it was held, that the wife was not restrained from anticipating her life estate. In the case of *Ross Trust* (*b*), where a testator bequeathed stock in trust for the separate use of his wife for her life, and directed it should remain during her life and be under the order of the trustees, made a provision for her, and the interest of it given to her on her personal appearance and receipt by any banker the trustees might appoint; Lord *Cranworth*, V. C., held, that the wife had power to alienate her interest.

Secondly. The principal ground of relief alleged is fraud, which the plaintiff has failed to prove; and the bill must therefore be dismissed: *Maguire* v. *O'Reilly* (*c*), *Ferraby* v. *Hobson* (*d*), *Glascott* v. *Lang* (*e*), *Knight* v. *Marjoribanks* (*f*), *Price* v. *Berrington* (*g*), *Wild v. Gibson* (*h*).

Thirdly. It was contended that this transaction had been entered into by the son under undue influence; but it was clearly a family arrangement, of which the son was to derive the benefit of present maintenance, and therefore could not be set aside: *Bellamy* v. *Sabine* (*i*). Suppose, however, the son had received nothing, but had taken upon

(*a*) 1 S. & S. 429.
(*b*) 1 Sim. N. S. 196—199.
(*c*) 3 J. & L. 224.
(*d*) 2 Ph. 255.
(*e*) Id. 310.
(*f*) 2 M. & G. 10.
(*g*) 3 M. & G. 486.
(*h*) 1 H. L. Cas. 605.
(*i*) 2 Ph. 425.

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himself voluntarily the father's debt, it would not be impeachable for fraud: *Thornber* v. *Sheard* (*a*).

Fourthly. Supposing the transaction in the first instance not free from objection, it was quite clear the parties had acted upon it, and restitution was impossible. The Court could not put the parties in the same position as they stood previously to the policies having dropped.

Lastly. It was clear there had been subsequent confirmation.

Mr. *Elmsley*, in reply.—The decision in *Field* v. *Evans* (*b*) is good law, and except for the word "assigns" is precisely the present case. On the other hand, this case was not within the principle of *Barrymore* v. *Ellis* (*c*). It was clear there need be no express words to operate as a restraint if the intention on the whole instrument was clear.

Secondly. It was said, that, there being charges of personal fraud, the plaintiff could not succeed on a minor case; but the bill contained distinct charges of constructive fraud, irrespectively of the general charge of fraud, quite sufficient to entitle him to relief in this Court: *Billage* v. *Southee* (*d*).

Thirdly. It was said, there was no proof of undue influence; but the burden of proving the fairness of the transactions was thrown upon those who derived advantage from them. The father acted as the agent of the mortgagees, and obtained a benefit for them from the young man. It was not, nor could it be, pretended that this was, a family arrangement, which could alone support such a transaction.

Then it was contended, that, the policies having dropped, restitution was impossible; but the answer to that argument was, that the surrender of the policies was not the act of the plaintiff, nor did he derive any benefit thereby.

(*a*) 12 Beav. 589.
(*b*) 15 Sim. 375.
(*c*) 8 Sim. 1.
(*d*) 9 Hare, 534.

Lastly. It was said, there had been a confirmation by the plaintiff of the transaction; but, in order to constitute a valid confirmation, there must first be a knowledge of his rights, an intention to confirm, and, lastly, a knowledge that the acts relied on as a confirmation had that effect. None of these ingredients existed here; and it was submitted, therefore, that the plaintiff was entitled to relief.

[Subjoined is an abstract of the petition in *Field* v. *Evans* (*a*).]

(*a*) 15 Sim. 376.

By the settlement made on the marriage of the plaintiffs Mr. and Mrs. Field, all the property which Mrs. Field took under her late father's will, whose estate the suit was instituted to administer, was conveyed to the trustees; and they were directed, during the life of the lady, from time to time to receive and take the rents, issues, and profits, and annual income of the settled property, when and as often as the same should become due, and to pay the same to her or to such persons as she should appoint, or otherwise to permit or suffer her to receive the same for her own sole use and benefit, separate from her then intended or any future husband, and so and in such manner that the same might not be subject to his control or debts, and so and in such manner that the receipt or receipts of the lady alone, or of any person or persons to whom she might appoint the same rents, issues, profits, and income respectively *after* the same should become due, should be a valid discharge in law to the person or persons paying the same for so much money as in such receipts should be acknowledged or expressed to have been received.

The trusts of the settlement after the wife's death were to the children of the marriage equally; and in default of children, as the wife should by deed or will appoint; and in default of such appointment, or so far as any such if made should not extend to the husband for life, if he should survive the wife; and on the death of the husband, and in default of appointment, then to the children of an uncle of the wife.

There was no issue of the marriage except an infant stillborn; and Mr. Field was at the time of the petition of the age of fifty-nine years.

By a deed poll, under the hand and seal of Mrs. Field, dated the 21st day of October, 1845, she appointed absolutely to her husband a portion of certain funds in Court, which had been carried to a separate account in the suit, and had recently become subject to the trusts of the settlement.

The husband and wife now

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*Judgment.*

The VICE-CHANCELLOR :—

By this suit the plaintiff seeks to set aside two securities as having been improperly obtained from him a few months after he came of age. The plaintiff attained his age of twenty-one on the 25th of May, 1848. The two deeds in question were executed on the 2nd of September, 1848, and by them he joined his father and mother in giving mortgage securities. One of the deeds is a security to the defendant Bradley for 1300*l.* The other deed is a security to the executors of John Lovegrove.

These securities are impeached on the ground of alleged pressure, and of an undue exercise of parental influence; under ignorance by the plaintiff as to their real nature; and of fraudulent misrepresentation, and suppression of material information by the defendant John Bradley, with the privity of the other defendant Lovegrove, to whom the security was given. Relief is also prayed as to a subsequent mortgage in October, 1850, for 700*l.*, not to set it aside altogether, but to have it stand as a security for such part only of the 700*l.* as shall be found to be justly due.

The parts of the case which require consideration are, first, the charge of undue pressure and an improper exercise of parental influence; and, next, the alleged suppression and misrepresentation as to the nature of the estate of the

presented a petition in the suit to have the appointed fund paid out to him.

The petition alleged that Mrs. Field was a person of a very delicate constitution, and it was "impossible" that she could have any issue.

The late Vice-Chancellor of England, according to the report of the case in the 15th volume of Mr. Simon's report, decided that the wife was effectually restrained from anticipation, and therefore the fund would not be paid to the husband during her life. Mr. *Cooper*, Q, C., the counsel engaged in the case, as appears from the judgment in this case, did not understand the Vice-Chancellor of England to have made any such decision. It seems probable, therefore, that the refusal to make the order prayed by the petition rather rested on the age of Mrs. Field and the gift over to the children of her uncle.

plaintiff's mother. She was tenant for life to her separate use of the mortgaged estate, and a great part of the plaintiff's case depends on the question whether her life estate was subject to a restraint against anticipation.

When the plaintiff attained his age of twenty-one in May, 1848, he was tenant in tail in remainder of the two estates comprised in the securities.

In the Castle Hill estate the plaintiff's estate tail was in remainder after an estate to his mother for life for her separate use, and a remainder to his father for life. In the Washwell estate, the plaintiff's estate tail was subject to a previous life estate in his aunt Mrs. Baylis, and then life estates to his father and mother as in the Castle Hill property. But the plaintiff's estate tail was liable to the contingency of the birth of other issue of his mother, who would have taken as tenants in common in tail with him. The mother had, however, a power of appointment by deed or will to any one child exclusively. As to the value of the estates: the Castle Hill estate is said to be worth from 300*l.* to 400*l.* a year, and the other estate from 400*l.* to 500*l.* a year.

When the plaintiff came of age, the life estates were charged with a mortgage of 1000*l.* to the defendant Bradley, and 500*l.* to the executors of Lovegrove; these sums being also secured by policies of assurance. By the impeached transactions these sums, and a further advance of 300*l.* by Mr. Bradley, were charged on the plaintiff's inheritance by the deeds of September, 1848.

As part of the transaction, and in order to make it effectual, the mother, by a deed of appointment dated on the preceding day (the 1st of September, 1848,) appointed the fee simple in remainder to the plaintiff. This deed of appointment, though part of the transaction, the plaintiff does not seek to set aside. Considerable stress was laid on the previous agreement executed by the plaintiff on the 30th of May, 1848, only five days after he came of age, by

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which he agreed to join in the security. The consideration expressed in this agreement is the expenditure by the father on the son's maintenance and education, and for his benefit.

It appears that the plaintiff had received a good education and was brought up to his father's business, that of a land surveyor, and, at the time of the transaction in question, was living with his father and mother. The father had expended sums to the amount of 1000*l.* in lasting improvements on the estate to the benefit of the son's inheritance. Just before the plaintiff came of age, Mr. Bradley, the mortgagee, threatened to call in his money unless the plaintiff would join in the security. This money had been advanced in the year 1844, at a time when the father's effects had been taken in execution by a creditor; and it appears, that, but for the son's joining in the transaction of 1848, the affairs of the family were in such a state that he the plaintiff, and his parents, would have but little prospect of being able to continue the establishment in which they were living together.

The situation of the family at that time was such that it was not easy to see, apart from any consideration of natural duty and filial affection, how the views of the plaintiff, as to his means of subsistence at the time, and of his establishment in life to carry on business, could have been better served than by the arrangement then made,—an arrangement which it is the object of this suit to set aside.

It was argued, indeed, that a judicious friend would have advised the plaintiff that it was useless to attempt to relieve his father by joining in the security, and that his better course was to preserve unincumbered his reversionary estate. But to justify the propriety and wisdom of any such advice, it will be necessary to shew some other scheme of life and of intermediate subsistence for the plaintiff during the life of the father and mother. But no such scheme has been shewn.

Upon a fair view of the whole transaction, there seems

nothing unfair, nothing unreasonable in it as a family arrangement, even if the money expended by the father on the estate was not a sufficient consideration. That the plaintiff perfectly understood the transaction is proved by various circumstances.

It has been argued, on the authority of *Archer* v. *Hudson* and some recent decisions, that in all cases of transactions between a father and son immediately after the son comes of age, where the father derives a benefit, an exercise of undue influence is to be presumed. It seems a strong thing to say, that the presumption of undue influence should be made and is to be the rule of the Court in such cases. The true doctrine of the Court is stated by Lord *Eldon* in *Tweddell* v. *Tweddell* (*a*) in these terms:—"The Court will not look on transactions between father and son in the light of reversionary bargains, but will regard them as family arrangements with a reasonable degree of jealousy, and will not look into all the motives and feelings which might actuate the parties in entering into such arrangements. There may be considerations in such cases which the Court could not possibly reach."

The same principle was acted on by Lord *St. Leonards* in the case of *Wallace* v. *Wallace* (*b*), where, after quoting the language of Lord *Eldon*, he said, "If it could be shewn that on the whole the son understood what he was doing, and that the case was one of family arrangement, I should have been most unwilling to look narrowly into the consideration."

Looking at this case with that reasonable degree of jealousy required in the investigation of all such transactions, it would seem that the previous expenditure by the father for the improvement of the estate, and the advantages which were likely to accrue to the plaintiff in point of position and future prospects in his profession by his con-

(*a*) 1 T. & R. 1. (*b*) 2 Dr. & War. 470.

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curring to preserve the family establishment, are consideration enough to support the securities given in September, 1848, as a reasonable family arrangement.

It has, indeed, been said on behalf of the plaintiff, that this is the case of a father urged, by the threat of a creditor, to exercise his parental influence to induce his son to do what was wholly to his detriment. But it is impossible on a fair view of the facts to consider that some advantage did not accrue to the son, and that the expenditure of the father on the estate was not a valuable consideration.

Sir *J. Leach,* in the case of *Rhodes* v. *Cook* (*a*), where there was a question as to undue parental influence having been used by a father over his daughters, stated the doctrine of the Court in nearly the same terms as Lord *Eldon,* and said that "such undue influence was not to be inferred, and that the assistance afforded to the daughters (who in that case were tenants in remainder in fee after the father's life estate) and to the father, might either be the effect of pure affection, or, under circumstances, might even be dictated by worldly prudence."

As to the alleged misrepresentation and suppression of material information touching the nature of the mother's life estate to her separate use, the plaintiff's case would require little notice but for the use made of the reported case of *Field* v. *Evans* (*b*). The misrepresentation is said to consist in treating the deed as a valid assignment of the separate estate of the mother. If that assignment was invalid, the effect would be to throw a greater burden on the plaintiff's inheritance; but, if the assignment was valid, that is, if there was nothing to restrain anticipation or alienation of the separate estate of the mother, the case of misrepresentation wholly fails.

It is admitted, that there is no express proviso in the usual form restraining alienation or anticipation of the

(*a*) 2 S. & S. 489. (*b*) 15 Sim. 375.

mother's estate; but, it is said, that there are words as to the receipts, which, upon the authority of the case of *Field* v. *Evans*, have the effect of restraining her from making any valid assignment or charge by way of anticipation. The words are, "In trust for the said testator's daughter, the said Ann Baker, and her assigns, for and during the term of her natural life, and to permit and suffer her to receive the rents and income to arise therefrom during the term of her natural life, separate and apart from, and independent of her then present or any future husband, and not subject to his debts, arrangements, or control; and I declare that the receipts of my said daughter, Ann Baker, alone, or some person or persons authorised by her to receive any payment of the said rents and income after such payments shall have become due, shall alone, notwithstanding her present or any future marriage, be good discharges for the said rents." According to these words, the trust is expressly in favour of the wife and her assigns. The words in the receipt clause scarcely carry the case beyond the words in *Acton* v. *White;* and but for the case of *Field* v. *Evans,* I should not have thought that there was anything to countenance the construction that such words in the receipt clause should control the right of alienation, which would have been incident to the separate property, even if "assigns." had not been expressly mentioned.

The case of *Field* v. *Evans,* as reported by Mr. *Simons,* considering the general value and accuracy of his reports, is not to be disregarded as an authority on slight grounds. But, after an accurate investigation, I am satisfied that Sir *L. Shadwell* did not in that case decide, or intend to decide, that the words in the receipt clause were sufficient to restrain anticipation. The question arose, not upon an assignment, but upon an appointment; and, as it might have been defeated by the birth of issue of the lady, that was a sufficient reason for refusing to make any order on the petition.

Having communicated with both the counsel engaged in

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the case, I find that neither of them considers it to have been decided on the ground that the words amounted to a restraint against anticipation. Mr. *Cooper*, one of the counsel, assures me that he did not understand that it was decided on that ground; and, as the facts of the case warranted the decision on other grounds, I feel satisfied that Sir *L. Shadwell* did not decide that such words in the receipt clause would restrain anticipation. The printed report is, I think, founded on some misapprehension.

There is no other case in which words in the receipt clause, importing that no receipt should be a good discharge to the trustees, unless it were the receipt of the wife or of some person appointed by her to receive the income after it should become due, have been construed to amount to an actual restraint against anticipation. When the trust itself is in favour of the assigns of the wife, it is difficult to control, by words merely relating to the receipt of the money, that right of disposition which is incident to property, not only by intendment of law, but, in this case, by the very terms of the trust.

The Court, indeed, has been asked to disregard the words "her assigns," on the maxim that, "expressio eorum quæ tacite insunt nihil operatur." That maxim can have no legitimate application; for the question is, whether a right, incident by operation of law, and therefore merely implied, is taken away by other expressions. In such a case the express mention of the right, as positively conferred and not left to implication, has a force and emphasis which would require some expression stronger, more clear, and more positive to take it away. If the words here had been—in trust for the separate use of the lady, or any person to whom she may assign the same,—the expression would still have been only of what is implied; yet, on a question as to the construction of subsequent words, seeming to take away the right to assign, they would have a force and efficacy far beyond mere implication.

If, upon the construction of the trust there was no restraint on anticipation, the plaintiff's case as to misrepresentation and fraudulent suppression totally fails. That the suppression of the words of the recited clause was not a fraudulent suppression, is proved, not only by their not being in my opinion susceptible of the construction put on them by the plaintiff, but by the undoubted fact that Lovegrove himself, who is accused of the fraudulent suppression, took a security for money of his own, advanced on the faith that there were no words to restrain anticipation. Yet the charge of fraud is made against a man who has given so decisive a proof as this of the honesty of his conduct.

During the argument I expressed my sense of the enormous length and wanton repetition in the pleadings of charges of fraud which it has been impossible to support on any reasonable or probable ground. The plaintiff's case is not improved by the parents appearing by counsel to support the case of undue influence exercised by them. The only part of the case which remains is as to the right of the plaintiff to open the settled account on the transaction of 1850; but there was a complete failure of the evidence to shew any fact which could authorise the Court to disturb the accounts.

The plaintiff's case fails as to every part of it, and the bill must be dismissed with costs.

Reversed - 7 De G. M. & G. 597

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*Dec. 4th, 5th, 6th & 7th.*

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*Feb. 24th.*

## MORRISON *v.* MORRISON.

A consignee of West India estates appointed by the Court, discharged at his own request, there being a large balance due to him:—*Held*, entitled to be indemnified out of the Slaves Compensation Money (which had been paid into Court and accumulated), for his expenditure and costs, in priority to a mortgagee whose security was prior to the suit, but who was not made a party till after the discharge of such consignee.

A consignee appointed by the Court and expending his money under its sanction, may reasonably look for reimbursement out of every fund arising from the estate under its control.

A consignee of the same West India estates appointed after the mortgagee had become a party to the suit, and the compensation money for the slaves had been paid into Court; a large balance being found due to him:—*Held*, that while consignee, he could not be repaid out of the fund in Court, but, on his amended petition, to be discharged, and to have the corpus paid to him, the order was made.

THIS cause, which related to the management of estates in the West Indies, came on to be heard, on exceptions to the Master's Report, made in May, 1854, and upon further directions.

Three petitions presented in the cause came on to be heard at the same time.

These petitions raised questions of priority of title to a fund in Court, being the amount of the compensation money awarded in respect of the slaves on the estates of the testator in the cause, in the Island of Tobago, in the West Indies, between two consignees, (who had successively been appointed, and had acted under the orders of the Court), and the mortgagee and other persons claiming the fund in Court.

This was a suit originally instituted for the administration of the real and personal estate of George Morrison, the testator in the cause, who died in 1814.

The testator's property consisted of estates in the Island of Tobago, called Greenhill and Friendship Estates, Les Coteaux Estates, and the Golden Lane and Mount Pleasant Estates, and of the slaves and buildings on these estates.

In pursuance of a decree made on the hearing of the cause in 1817, Mr. Edward Ellice, one of the petitioners, was, in the year 1819, appointed consignee of the rents, profits, and produce of the testator's estates.

By an order made in 1830, Mr. Edward Ellice was dis-

charged from being such consignee; and it was ordered that he should pass his final account before the Master, with liberty to apply respecting any balance which might be found due to him on passing his accounts.

Under an order of the 10th of March, 1837, certain sums, being the amount of compensation money awarded in respect of the slaves on the estates, were transferred into the name of the Accountant-General in trust in these causes, to accounts severally intitled "The Account of the Compensation Money in respect of the Slaves on the several Estates" above mentioned; and it was ordered, that the same should be without prejudice, and that the interest and accumulations should be invested in trust to the credit of the like accounts respectively.

The sums thus transferred into Court consisted of the following amounts:—422*l.* 3*s.* 11*d.*, 3*l.* per cent. Consols, the produce of the sum awarded for the slaves on the Greenhill and Friendship Estates; 2566*l.* 18*s.* 3*d.*, like Consols, the produce of the sum awarded for the slaves on the Golden Lane and Mount Pleasant Estates; and 8920*l.* 6*s.* 7*d.*, like Consols, the produce of the sum awarded in respect of the Les Coteaux Estate.

The estate called Les Coteaux, with the slaves and buildings thereon, was subject to a mortgage for securing the repayment of 7500*l.* and interest at the rate of 6*l.* per cent. per annum. This mortgage had, prior to 1839, become vested in Mr. Russell Ellice, as the mortgagee.

Subsequently to 1815, the bill was repeatedly amended and revived; and in 1839, a supplemental bill was filed, bringing Mr. Russell Ellice as the mortgagee of the Les Coteaux Estate, and other parties, before the Court.

Mr. George Forsyth was, in 1841, under an order of the Court, duly appointed and became the consignee of all the estates of the testator, George Morrison, in the island of Tobago.

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*Statement.*

By a report made in all the causes, in 1842, and which was duly confirmed, the Master found that he had allowed the account of Mr. Russell Edward Ellice, the consignee, and that there was a balance of 5335*l.* 8*s.* 7*d.* then due to him as consignee.

The whole amount remained unpaid.

Mr. George Forsyth, from time to time, passed his accounts as consignee; and on the 24th of April, 1854, the Master certified that the sum of 32,815*l.* 17*s.* 3*d.* was due, in respect of all the estates of the testator, to him, up to the 30th of April, 1852.

The Master made his general report on the 2nd of May, 1854, pursuant to an order made on the 23rd of May, 1844, whereby it had been referred to him to inquire and state what incumbrances, not included in any previous report, there were affecting the estates, and the sums awarded as compensation money for the slaves thereon.

By that report, the Master found that the sum of 18,343*l.* 3*s.* (being the sum of 7500*l.* secured by the mortgage of 1795, and 10,843*l.* 3*s.* for arrears of interest thereon), was due to Mr. Russell Ellice, and that the same was charged upon and payable out of the Les Coteaux Estate, and the compensation money awarded in respect thereof; but the Master submitted to the judgment of the Court, whether that sum was or was not a first charge or incumbrance upon and payable out of the estates.

The sums awarded for compensation money in respect of the slaves on the estates were invested according to the order of the 10th of March, 1837, above mentioned; and the same, with the accumulations thereon, standing in the name of the Accountant-General to the credit of the causes, to the account of the compensation money on the several estates, were the sum of 15,307*l.* 2*s.* 8*d.*, 3*l.* per cent. Consols, in respect of the slaves on Les Coteaux Estate; the sum of 4400*l.* 19*s.* 2*d.*, like Consols, in respect of the slaves on the Golden Lane and Mount Pleasant Estates; and the sum of

7248*l.* 12*s.* 11*d.*, like Consols, in respect of the Greenhill and Friendship Estates.

The cause now came on for hearing upon exceptions to the Master's report, and upon further directions, on which no question of importance arose. The exceptions were overruled.

Three petitions came on for hearing at the same time.

The first petition was presented by Mr. Edward Ellice, who had been appointed by the Court consignee in 1817, and discharged in 1830; and it prayed that it might be referred to the Chief Clerk to calculate interest on the sum of 5335*l.* 8*s.* 7*d.*, the amount found due to him Mr. Edward Ellice, as consignee, and to certify the amount due to the petitioner for such balance and interest, and that the amount to be thereupon certified to be due to the petitioner might be paid out of the proceeds of a sale of a sufficient portion of the sums of 3*l.* per cent. Consols then standing to the credit of the cause, together with his costs.

The second petition was presented by Mr. George Forsyth, who had been appointed by the Court consignee of the estates in 1841, and to whom the Master, by his certificate, dated the 24th of April, 1854, had found that the sum of 32,815*l.* 17*s.* 3*d.* was due up to the 30th of April, 1852. By this petition, it was asked, that the accumulations of interest and dividends on the sums in Court, the produce of the compensation money awarded in respect of the slaves, and that all future interest and dividends on the same funds might be paid to him in satisfaction, so far as the same would extend, of the above sum found due to him, and for the costs of his petition.

The third petition was by Mr. Russell Ellice. By this petition the Court was asked to order, that the amount of compensation money awarded in respect of the slaves on the Les Coteaux Estate, and the accumulation thereon, standing in the name of the Accountant-General to the cre-

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dit of the cause, should be paid to him Mr. Russell Ellice, as mortgagee, in discharge of the sum of 18,343*l.* 3*s.*, which, in 1854, the Master had found to be due to him upon the mortgage of 1795, and the arrears of interest thereon, so far as the same would extend, in priority to Mr. Edward Ellice and Mr. George Forsyth, the consignees.

*Argument.*

Mr. *Wigram* and Mr. *Wickens*, in support of the petition of Mr. Edward Ellice, and also of the petition of Mr. Forsyth, submitted, that Mr. Edward Ellice and Mr. Forsyth, as consignees, had a claim preferable to that of the mortgagee. The debts of the consignees consist of the balance of advances made by them beyond the produce of the consignments to them, which are necessarily made in order to keep the estate "going," and preserve it as a profitable property for all who are interested in it. Even where the consignees are such without an order of the Court, their lien ought to be, and is, paramount to that of all incumbrancers; but, where they are appointed by the Court, as both Mr. Edward Ellice and Mr. Forsyth in the present case had been, the Court will, in administering the estate, indemnify its own officers, such as these consignees are, for expenditure properly incurred in discharging duties imposed on them by the Court, out of the fund in Court which represents the estate on which the consignees would have had a lien, and out of all property over which the Court has jurisdiction in the cause. The consignees thus appointed being officers of the Court, it was competent for mortgagees and other persons interested in the estate to have objected to the consignees' accounts from time to time as they were passed, and to have procured other consignees to have been appointed, if they could have made out a case of improper advances.—They referred to *Scott* v. *Nesbitt* (*a*), *Farquharson* v. *Balfour* (*b*), *Sayers* v. *Whitfield* (*c*), *Si-*

(*a*) 14 Ves. 438. (*b*) 8 Sim. 210. (*c*) 1 Knapp, 133.

*mond* v. *Hibbert* (*a*), and to the judgment delivered on the 2nd of June, 1852, by the Lord Chancellor Lord *St. Leonards*, in a case of *In re Tharp* (*b*).

*Argument.*

Mr. *Bacon*, Mr. *Malins*, and Mr. *Brett*, for Mr. Russell Ellice, the transferree of the mortgage of 1795, did not deny that the petitioners, the consignees, had a lien, but submitted that the lien of Mr. Russell Ellice, as mortgagee, on the accumulations and income of the Les Coteaux estate was prior to that of the consignees. Mr. Edward Ellice had been appointed a consignee, and had been discharged, before Mr. Russell Ellice was a party to the suit; so that, whatever was done under that appointment, was done in his absence, and could only affect the persons who then were parties to the suit; and, as to Mr. Forsyth's consigneeship, his possession under it was no higher than the possession of the mortgagors, and, at most, he could, as against a mortgagee, be entitled only to the income of the fund in Court, which must be treated as representing the rents and profits of the land.

It might be, that both the consignees, having been appointed by the Court in the cause for administering the testator's estate, were entitled, subject to the mortgage, to liens upon the fund in Court and accumulations, in priority to all the parties to the suit, for whose benefit they were appointed consignees, except the mortgagee.

Mr. *Elmsley* and Mr. *Bovill* for general creditors of the estate.

Mr. *Cracknell* for the tenant for life of a part of the estate.

(*a*) 1 Russ. & My. 719.

(*b*) Not reported. The reporters have been favoured with a copy of the short-hand writer's note of this judgment, which will be found at the end of this case, at p. 578.

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*Argument.*

Mr. *Craig* and Mr. *Morris* for the parties beneficially entitled, subject to the tenant for life's estate under the testator's will.—The lien of a consignee is only upon the annual produce, it is not upon the corpus.

In *Scott* v. *Nesbitt*, which has been relied on on the part of the petitioners, the consignee was in possession; and it does not follow that the decision would have been the same if the consignee had been out of possession, which is the present case.

In *Shaw* v. *Simpson* (*a*), Lord Justice *Knight Bruce*, when Vice-Chancellor, disposed of the claim of a consignee to have any lien on the corpus of the estate, and explained *Scott* v. *Nesbitt* so as to destroy its authority in favour of the petitioners. He said (*b*), that, with respect to the claim of the petitioner to have the corpus of the estate sold, he saw no solid ground of distinction between the case of a consignee of West India produce and the agent of a copper mine or colliery, who never could be heard to insist on a sale of the estate for payment of the balance due to him. The observations of Lord *Eldon* in *Scott* v. *Nesbitt* seemed to refer to a dormant lien only. At all events, no case had been cited in which a sale of the corpus of the estate had practically been allowed. On this authority neither of the two petitioners can, as consignee, be entitled to a lien on any portion of the fund except the accumulated interest. But, as to Mr. Edward Ellice, he was on his own petition discharged in 1830, and, as well by reason of his laches, as of his having been deprived of his character of consignee, he has lost all title to the accumulated income, even if he ever had any.—They also referred to an Act of the Legislature of the Island of Tobago, 52 Geo. 3 (*c*).

Mr. *Bacon* also appeared for the plaintiffs in the suit,

(*a*) 1 Y. & C. C. C. 732. (*b*) Id. 735. (*c*) Howard's Col. Laws, 319.

and opposed the petitions of the consignees on their behalf.

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*Argument.*

Mr. *Rogers* for another party.

[The VICE-CHANCELLOR referred to the observation of Lord *Cottenham* in *Ex parte Pollock* (*a*).]

Mr. *Wigram* in reply.—In *Scott* v. *Nesbitt* the consignee was not appointed by the Court, which the petitioners in this case are; and that broad distinction renders that case no authority against the claim in the present application. The observations of the Court in *Shaw* v. *Simpson* cannot be considered as applicable to the claim of the present petitioners. They referred to a state of things where the land remained unsold and unconverted, but the present is a case where, by means of the compensation money received for the slaves on an estate, the corpus has been in part converted, and is in the hands of the Court; and under such circumstances the Court in the same case of *Shaw* v. *Simpson* expressed an opinion that the consignee should be reimbursed his advances out of the fund in Court—that is, out of the produce of the land. That was the opinion expressed, though it was not necessary to act on it in that case.—He also cited *Tipping* v. *Power* (*b*).

*Dec. 7th.*
*Judgment.*

The VICE-CHANCELLOR :—

Two of the petitions of which the Court has now to dispose are by consignees, who were appointed under orders made in these causes.

Upon passing their accounts, under the direction of the Court, large balances have been found due to each of them.

(*a*) 4 Deac. 275. Reported also as *Ex parte Pollard*, see post, 573.
(*b*) 1 Hare, 405.

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They pray to have the amount so found due paid to them out of the compensation money now in Court in trust in these causes.

That compensation money is part of the proceeds of the estates of which each of the petitioners acted as consignee. But as to Mr. Ellice, his consigneeship had terminated before the compensation fund accrued; and, as to the other petitioner, Mr. Forsyth, his consigneeship did not begin till after the compensation money had been paid into Court.

The question as to the right of the consignees to repayment out of these funds has been argued by reference to several reported cases, and to other cases not recorded in any printed reports.

In some of these cases the consigneeship was not under the order of the Court. It is, therefore, necessary to distinguish accurately what has been said by various Judges of this Court as applying to the case of a consignee who seeks reimbursement on the footing that he has a lien on an estate preserved by his expenditure during a management conducted by arrangement with the owners, from what must be kept in view as to the rights of a consignee acting under the direct appointment of this Court, and making advances sanctioned by its orders.

The case of *Scott* v. *Nesbitt* (*a*) was that of a consignee not appointed by this Court, who claimed a lien on the estate for his advances made before the Court took possession. Lord *Eldon*, in that case, sustained the right of the consignee to a lien on the estate on equitable principles, although there was no usage in the colony to sanction it. The peculiar nature of West India property, and the rights of the owners of it, whether mortgagees or others, being subject to the expenditure necessary for its management,

(*a*) 14 Ves. 438.

justified, in his opinion, the claim of lien by the consignee. He said, that the concerns of such estates could not be carried on without consignees; and all moral justice required, that, for all sums for which, in the fair discharge of their duty, they became liable in respect of the management of the estate, they should be indemnified in priority to the claim of those who had interests in the estate to be so managed, and before any person can have any benefit from it.

This right of the consignee Lord *Eldon* upheld, even against the incumbrances on the estate; and this Lord *Cottenham* notices with approbation in his judgment in *Ex parte Pollard* (*a*).

In the case of *Simond* v. *Hibbert* (*b*), Lord *Lyndhurst* affirmed the decision of Sir *John Leach* in favour of the consignee not appointed by the Court. Lord *Lyndhurst*, however, according to the short report of his judgment, seems to have treated the lien as created by the course of dealing between the parties, which fastened the liability on the estate and excluded any personal liability of the owners.

Lord *Eldon*, on the other hand, treated the consignee as entitled to a personal remedy against the owners; the dealing with the estate by the consignee creating a personal contract in respect of which the estate is liable.

If such be the rights of consignees, acting under private authority, a consignee appointed by the Court, and expending his money under its sanction, may reasonably look for his reimbursement out of every fund arising from the estate under its control.

In the present case, his right is opposed by the mortgagee on grounds which would entitle that mortgagee to take out of Court the whole fund, leaving the consignee unpaid for his expenditure.

(*a*) 4 Deac. 275. (*b*) 1 Russ. & My. 719.

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It is, however, not easy to understand on what principle any incumbrancer on the estate in the possession and management of the Court can claim its proceeds free from the burden of the expenditure properly incurred in its management and authorised by the orders made in the cause. If the mortgagee had chosen to exercise his legal right he might have taken possession of the estate. If he had done so, he must have managed it by a consignee of his own appointment, and must have paid to that consignee any balance due on the settlement of the accounts. That balance would have been the personal debt of the mortgagee, and the consignee would have had his remedy for the recovery of it, not only personally against the mortgagee, but by that lien on the estate itself which had been preserved by his expenditure.

But in this case the mortgagee did not take possession. He allowed the Court, by a consignee of its own appointment, to take possession, receive the produce, and provide the supplies by an expenditure which the mortgagee himself did not choose to incur. The debt due to the consignee appointed by the Court for the excess of his expenditure beyond the proceeds of the estate has been properly ascertained, for his accounts have been passed before this Court in the presence of the mortgagee as well as of all the other parties to the cause.

It is said, indeed, that the mortgagee was not made a party to the suit until after the compensation money was paid into Court in 1836. But the possession and management of the estate by the Court, through its consignee, has existed since 1817, and all the expenditure properly allowed to the successive consignees in keeping up the estates must have fallen upon the mortgagee if he had chosen to take possession. He has preferred the management by the Court to the risk of a management by himself and his own consignee. I say he has preferred it, because he might at any period have claimed his right to the possession and

management, with all its risks. Therefore, the circumstance that the mortgagee was not made a party to the cause till after the compensation money was paid into Court, cannot affect the right of the consignee to repayment out of the compensation money, or out of any other proceeds of the estate which he managed under the directions of the Court.

The relative rights and liabilities of the mortgagee and consignee are unchanged by the mortgagee being made a party to the suit, because the estate and interest of the mortgagee, as mortgagee, have been all along the same, and the expenses of keeping up the estate are a liability to which the mortgagee has all along been subject, as well before he became a party to the suit as since.

Lord *Eldon*, in *Scott* v. *Nesbitt*, speaking of the debt due to a consignee for supplies to keep up the estate, where that consignee was not the officer of the Court, says, it entitled the consignee to a personal remedy against the owners, "the dealing [of the consignee] with the estate creating," says Lord *Eldon*, "a personal contract in respect of which the estate is liable."

Where the consignee is the officer of the Court, and acting for the benefit of all who are owners of the estate, the Court must apply such parts of the estate as are in its hands to make good the balance which it finds justly due to him for the expenditure which has been incurred, under its authority, in dealing with the estate.

In the case of *In re Tharp*, (before Lord *St. Leonards*, and not reported,) the right of the consignee of the West India estate to be reimbursed out of the rents of the English estates, although the consignee was not the receiver of those estates, was recognised by Lord *St. Leonards*.

The mortgagee in the present case, claiming to take the compensation money as his property, and to leave the consignee unpaid for the expenditure, seeks to evade the expenses of that management which he left to the Court.

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*Judyment.*

To permit the mortgagee to take this compensation money, or any other part of the proceeds of this estate, or any fund in this cause belonging to the mortgagee or other owners of the estate, without reimbursing the consignee the debt found due to him for the management on behalf of all the owners, would be a violation of those principles of natural justice on which Lord *Eldon* said he proceeded in the case of *Scott* v. *Nesbitt.*

The settled estates and the devised estates have been, pursuant to the directions of the Court, under one common system of management by the consignees. By the decree on further directions, in 1827, and afterwards by the order, in 1831, the Court directed the Master to separate the accounts; and by the latter order, anticipating the impracticability of such a separation, directed him to make such apportionment of the proceeds as should seem just.

The final general report of May, 1854, on which the Court must now give further directions, shews, as the result of those directions for separation and apportionment, after all the repeated attempts by petitions, exceptions, and appeals, that the Master has found it impracticable to make any separation or apportionment beyond what he has stated as to the Greenhill and Friendship Estates. As to these two estates, pursuant to the report, the amount of the compensation fund which now stands to the joint account of the two estates must be carried, as to one-third, to the separate account of Friendship Estate, and as to two-thirds to the separate account of the Greenhill or settled estate.

The balance due to the consignee, being on the accounts of the gross receipts and expenditure as to all the estates, must be borne rateably by all.

Such part of the expenditure of the consignees as consisted in payments for maintenance and costs of the suit, being made under the orders and authority of the Court, must, as to the consignees' right of repayment out of the funds under the control of the Court, stand upon the same

footing with the outlay for keeping up the estate; for the mortgagee has not sought to set aside any of the orders or decrees which authorised these payments by the consignee.

As to interest on the balance found due to the consignees, I have asked the Registrar to inquire as to the practice of the Court. No precedent has yet been furnished, and, in the absence of any precedent, the more just view is to treat the interest as allowed in compensation for the delay in payment, and to give it at 4*l.* per cent. per annum, according to the course of the Court.

The petition of Mr. Ellice being for payment on his final discharge, after passing all his accounts, there must be an order on it for payment to him of the amount of the balance found due on his final account, with interest at 4*l.* per cent. per annum from the date at which the Master found the balance, together with the costs of his petition, out of the various sums in Court, to be borne by those funds rateably according to their gross amount.

As to the petition of Mr. Forsyth, proceeding on the authority of the case of *Farquharson* v. *Balfour*(*a*), he, as consignee, is not entitled to be paid out of the corpus of the estate so long as he continues consignee, and I see no ground for making any distinction between the principal and interest of the compensation money. Nor can I make at present any order on the petition of the mortgagee, as I cannot, without the consent of the consignee, in the present state of the causes, make any order for payment out of any fund in the cause to which the consignee, on passing his final account, may, on the principles which I have stated, claim to be paid.

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Mr. Forsyth obtained leave to amend his petition, so as to enable himself, as a discharged consignee, to be recompensed out of the corpus of the fund in Court.

(*a*) 8 Sim. 210.

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*Judgment.*

By his petition, thus amended, it was prayed that Mr. Forsyth might be discharged from being consignee, that he might pass his final accounts as such consignee, and that so much of the residue of the funds in Court, after satisfying what might be due to Mr. Edward Ellice as the prior consignee, as might be necessary for that purpose, might be paid to him, Mr. Forsyth, in discharge of the balance to be found due to him, and for his costs.

The order made on the petition of Mr. Edward Ellice, and on the amended petition of Mr. Forsyth, was in accordance with the above judgment of the Vice-Chancellor.

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1852.
*June 2nd.*

IN THE MATTER OF THARP.

A consignee of West India estates, appointed by the Court, has a right to be reimbursed his expenditure out of the rents of the English estates of the same owners, although the consignee is not the receiver of these estates.

THE LORD CHANCELLOR (LORD ST. LEONARDS).—I have already stated that I do not mean to decide any question in this matter at present, and that it will be necessary that this matter should be argued with reference to the different questions, very deliberately, before the Court. In throwing out what my present impression is, with a view to assist the counsel in the future argument of the case, I will just point out what presses upon my mind.

The first question is this: It is contended for the merchants, the consignees, that they have now a charge upon the corpus of the estate, upon the inheritance of the estate of which the lunatic is only tenant for life, for the whole amount of their claim of some 200,000*l.* or 300,000*l.* Now I think it is impossible to make out that charge at present, in the way in which it is endeavoured to be sustained: that I think quite impossible. But there has been a prevailing impression in the profession, that the consignee's charges upon a West India estate stand upon a different footing to the common charges in this country. That is undeniable, and the difference between the estates accounts for it.

In Ireland, it is a very common equity to have, as a prior charge to all other incumbrances, what is called salvage money:—Where a leasehold estate, or an estate held for lives to which half a dozen people are entitled in succession, many of them being mortgagees, according to certain priorities, the last man of all who is entitled after everybody, being in possession, redeems, I may say, the estate by paying the landlord, who otherwise would have recovered the estate and taken it from everybody: this payment is what is called

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salvage money. That is an established equity, and a very proper equity. He that pays the salvage has a prior incumbrance to every other charge and interest, because, so far as any interest is left to anybody beyond the charge, it is acquired by that payment, in the shape of redemption money. Now it must be upon some such principle that this claim is to be maintained in any way. The claim would seem rather to attach only as regards the compensation money for the slaves, because, as the estate is represented as of no value, but on the contrary amounting to a yearly loss of 2500*l.*, it would be difficult to say that any large sum is to be paid in respect of saving that which happens to be destroyed. But as regards the compensation money for the slaves, without the large expenditure made for the supply of those slaves and their maintenance for the cultivation of the estate, those slaves could not have continued to exist up to the time of redemption by the great grant of 20,000,000*l.* by the people of this country, to redeem slaves from a state of slavery. And if therefore the money which represents the slaves was the produce of that expenditure, which must depend upon very elaborate inquiries and considerations, then to that extent the monies expended by the merchants might be considered as salvage money which had produced those slaves, which slaves had been liberated or redeemed with that money which now represents them in this Court, and to that extent the charge may perhaps be established.

I apprehend that, generally speaking, with reference to the equity of West India Estates, it could hardly ever have gone beyond this, as I said in the course of the argument, that, where consignees were supplying the estate as they ought to do, sending out all the supplies, all the machinery, all the clothing, all the food in point of fact, except what was found in the place itself, and were receiving back, as they did, all the produce of the estate, except what was sold, the common portions of it sold in the island, and keeping the accounts as they did, and charging their commission, there then was a balance on their accounts, which in the case of a tenant for life would not have properly gone to the tenant for life, until their account was cleared, and they could not and ought not to have allowed the tenant for life to have received any portion of these profits, if they were dealing with a tenant for life, until their account was paid; and if in that case, after the tenancy for life, it turned out there was still a balance due, and that balance had been properly incurred in maintaining the estate, then it might properly be represented as money laid out for the benefit of the inheritance; and therefore that balance at that period ought to be a charge on the tenancy in remainder of the estate. That, one could understand; but as to a general charge on the inheritance by the mere circumstance of merchants acting for a tenant for life, and not consulting the remaindermen, though they may have been parties to a cause in which an order may have been

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*Judgment.*

made for the appointment of those consignees, as to every shilling of the expenditure being a charge on the inheritance (I am speaking as at present advised, not binding myself to anything) that is an extent of argument to which I cannot at all go.

The first thing to be done on this account, with a view to its rectification, in its bearing on the different parties, would be to divide it into different portions, and the first portion which must be clearly cut off and stand on its own footing, is that portion which is represented, as it is said, but it does not matter what the sum is, to have amounted to 230,000*l.*, and to have been added as a debt on the part of the consignees by the policies of assurance. Now, the policies of assurance, beyond all doubt, were effected at the expense of the life estate, which at this moment I will not consider; but whether the merchants were entitled to have those policies kept on foot out of the life estate, is a question to be considered; but they could have no pretence to have had the policies at all, except by the order of the great seal. They could not of course have effected policies, and thrown the expense on the estate even of the tenant for life, and therefore we must look to the order of this Court, acting under the sign manual, to see what authority was given, and what the Court meant to do in that respect.

Now, the Court made an order which I cannot possibly approve of, that is, it made an order for the payment ultimately of the expense of these policies, and of the rents of the English as well as West India estates, but reserving the question, whether the rents of the English estates, as I understand it, ought to have been so applied. That is a very mischievous order. The Court ought to have addressed itself, as I apprehend, speaking with submission, to the duty of deciding at the time, whether or not the fund was properly applicable. To postpone that duty would only tend to introduce difficulties, which afterwards do so complicate a case that no human power can deal with it. By disposing of the points as they arise, the case ultimately presents no real difficulty.

Now that question involves this, whether or not the consignees are entitled to the benefit of the whole produce of the estate in discharge of their demand. They were consignees only of the West India estates, and they were not receivers of the English estates; but there being a debt now represented by some hundreds of thousands of pounds, the question is, whether the English estates of the tenant for life are, or are not, responsible for that debt. I have already said, and I repeat it to prevent any misunderstanding, that I am deciding nothing, but it strikes me that the English estates are liable, because, supposing the tenant for life in any ordinary case had estates of these two sorts, and he employs a man as a receiver of one of them, what would be the result? Why, that, whatever is the profit of the estate, he takes whatever is the loss on the account

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*Judgment.*

of the receiver, he acting as his agent, and under his authority, in respect of the one estate, he must bear out of his general estate, it is a debt as against him. Then, when the great seal takes possession of both the estates of the lunatic, and appoints a man a committee of the one estate, does it not act as the tenant for life himself would have acted, if sane, and does it not incur the same liability, as representing the lunatic's estate generally, as the lunatic, if sane, would have incurred in respect of all his property? I cannot therefore at this moment see, looking at it now, on what principle it can be contended that all the estates of the lunatic, to the extent of his life interest, are not bound by the debt which is incurred in respect of the Jamaica estate alone. Suppose no man would have taken the appointment of consignee, and that the Court had been forced to act itself as if it were the owner; what must the Court have done? The Court must have done the very act which the consignee did. It might have bought the supplies in the market here, it must have sent them out just as the consignees did, and have sent them to the West Indies, where they would have been in effect swallowed up and destroyed, as they have been under the management of the consignees, not from any fault of the consignees, but from the unhappy condition, through change of circumstances, of West India estates. Well, then, in that state of things the same result would have happened; that is, that the debts so incurred by the great seal itself must have come out of the general assets of the tenant for life. I apprehend, therefore, that that will ultimately be the view which whoever has to decide the case must take.

Now to come back to the policies. They have been effected out of the life estate of the lunatic. They belong to the lunatic's life estate and to nobody else, subject to this charge. If this charge is to be considered as a charge on the inheritance, which I think it cannot, and if the tenant for life is to contribute his proportion, which he must, and if this proportion did not go beyond that which was expended on the policies, it may then turn out that the policies would belong to the persons entitled in remainder, they would go certainly in ease of the debt; and if the debt were relieved to that extent, that would be a relief to the persons in remainder, supposing them to be liable to the debt itself. Now these policies, belonging to the life interest, as I must take it at present, must be dealt with in a lunacy on a separate ground. If the circumstances of the lunatic's life estate would permit them to be kept up, and at the same time leave sufficient provision for the lunatic's maintenance, and also leave a sufficient security for the merchants' debt, then it would be proper to keep them up after they had been so long maintained; but if it should turn out, on consideration, that the keeping them up would only go on increasing the debt in a much greater ratio than any sum received can ever pay, then it may become a very great consideration whether

1852.

*In re* THARP.

*Judgment.*

those policies should not now be sold, and the money at once applied in redemption, as far as it will go, of the merchants' demand. That is, I think, one great question to be ascertained; and if those questions as to the liability of the life estate, and as to the propriety of keeping up the policies were decided, then a good deal of difficulty would be removed from this case. But then there is this very important consideration,—what is to be done with these West India estates? The merchants represent they will no longer continue as consignees. I cannot bind them to continue as such. Then what is to be done? I am stating that which is not denied, that every year's account latterly shews, instead of a gain, a loss of 2500*l.* a year. I cannot possibly allow that loss to go on adding a debt that never can be paid as against the lunatic's life estate, or even as against those in remainder; and the remaindermen sit by here,—probably they will become a little more active when they consider the real state of their affairs,—but they sit by here on this occasion, and say, We have no concern with it; it is with the tenant for life. Do what you will. I do what I will, and what I ought to do, and what I shall do, if I am driven to it. I shall direct the West India estates to be abandoned or thrown up, if they cannot be sold. I will sell the life interest, if I can sell it, and discharge the debt under the Act, if it can be done; if not, it must be abandoned, thrown out of cultivation, and let what can, be done. Then the remaindermen will have to consider what position they are in. That will introduce simply this question, Is the estate worth preserving or not? If it be worth preserving, then all persons interested, the tenant for life, the lunatic, and this Court which represents the lunatic, acting of course fairly between all parties, and tenant for life in remainder, who may become entitled if there is no issue, in short, all persons having an interest in this property, if worth preserving, must seriously address themselves to the consideration of the question,—Is the estate worth preserving? or they will find that the estate will suddenly be abandoned, and will be lost to them, as well as to the tenant for life.

If that is so, I shall have to consider ultimately what is to be done in regard to the payment to the merchants. I should certainly give them the means of payment, so far as the policies afford, if it be demanded by sale of those policies. Then if they are entitled, as I should apprehend rather at present they are, to the whole of the life estate, I should, as far as that life estate extends, be compelled to consider, what would be most painful for me to carry into execution, whether the allowance to the lunatic ought not to be reduced; for anxious as I always am, and always shall be, to do everything that is proper to be done for the proper maintenance of the lunatic, according to his station, under the care of the Court, yet I am bound to see that the interest of the honest creditor, whose debt has been created for the benefit of the estate, and the lunatic, under the

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direction of the great seal, is not neglected, but must be duly provided for out of the life estate, if the life estate only be subject to the debt. If that shall turn out to be the case, therefore, I must consider whether that amount of 3000*l.* and odd can be continued to this gentleman, and I must appropriate the whole of the remaining income of the life estate. I am assuming always it is liable, not deciding, that I shall be compelled to appropriate the whole remaining interest to the extension of the debt. It might be a question, whether even the life estate should not be sold. If it could be sold under the Act of Parliament, that would be another question which I do not touch. The result, therefore, really is, that this is a case in which the parties may, by coming to some reasonable understanding between themselves upon some of these questions, save themselves from very great loss; but they will determine that for themselves, and consider for themselves what they had best do; in the meantime, I shall direct this case to stand for the first day after term, and to be regularly argued by the different parties on the points of law to which I have now adverted. I shall request that as much care as possible may be taken by the counsel, which I know they will willingly do, as to the consideration of so difficult a case, and that they will assist the Court to the utmost of their power, (and I know I need not ask in vain) in the consideration of the question, with a view to its ultimate decision.

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A testator gave one-third part of the "amount of money" that might accrue from his claim on a testator's estate in course of administration in Chancery to his son, and the other two-third parts thereof to his wife and his son-in-law for their lives, with remainder to the son. The larger part of the amount was, after the date of the will, received by the testator under orders of the Court, and invested in his name in Consols, some small part of which he sold, but afterwards repurchased in part. The executrix on the testator's death, treating this stock as the subject of the legacy, transferred the son's one-third to him, and she also transferred the two-third parts to trustees, who paid the in-

come to her and the son-in-law :— *Held*, on the principle of the civil law, that the testator having set apart a specific fund received by him, in order that it may be expressly reserved for the benefit of the legatee, it was not adeemed.

*Held*, also, that the acts and course of dealing for a period of thirty-two years with the fund, as appropriated to answer the legacy, was a circumstance of great weight in rebutting the case of ademption, and the claim on the footing of a resulting trust. *Clark* v. *Browne*, 524

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## APPOINTMENT (POWER OF).

1. By a voluntary settlement in 1848, a settlor transferred a debt to a trustee in trust for such persons and purposes as the settlor should by any deed or instrument in writing appoint, and in default to pay the income to the settlor for his life, and on his death to distribute the amount amongst specified persons. He afterwards executed an appointment by deed of part of the fund, and confirmed the trusts of the settlement as to the remainder. By his will, made in 1852, the settlor gave certain legacies, and then gave "all his personal estate not otherwise effectually disposed of" to trustees : — *Held*, first, that the settlor had sufficiently expressed his intention not to affect the unappointed property comprised in the settlement of 1848 ; and secondly, that, even if no such intention appeared, the Wills Act (7 Will 4 & 1 Vict. c. 26, s. 27,) applied only to cases where the power of appointment was equivalent to absolute property.

*Semble*, that the power of appointment contained in the deed did not authorise an appointment by will.

It is not the duty of the Court to strain the words of a power of appointment, in order to bring them within the 27th section of the Wills Act, but to ascertain whether the power is in the widest and most general terms. *Moss* v *Harter*, 458

2. Where there is a valid appointment to an object of the power, with additional words of appointment in favour of the appointee's children, by which in excess of the power those children are also made appointees, so as to cut down the previous absolute interest :—*Held*, that the words in excess of the power are to be altogether rejected, and that the appointee, who is an object of the power, takes absolutely. *Re Lord Sondes' Will, Re Hon. H. Watson's Will, Re The Trustee Act*, 416

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## APPORTIONMENT.

A testatrix, by will, in 1841, gave to two devisees, who were also her executors, all her real and personal estate, upon trust for sale, and she gave out of the produce of her

real and personal estate 50*l.* to each executor for his trouble, and other pecuniary legacies. There was no gift of the residue; and, after payment of debts and legacies, a surplus remained. The testatrix left no heir-at-law or next of kin.

The Court apportioned the legacies and costs of the suit between the proceeds of the real and personal estate, and the Crown was declared to be entitled to the surplus of the personal estate. *Cradock* v. *Owen*, 241

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The executor of a testator having given to a legatee the Legacy Office receipt for duty on the legacy, on a bill filed against the executor of the executor of the original testator by the legatee, to establish the legacy:—*Held*, an admission of assets. *Lazonby* v. *Rawson*, 267

*Legal.*

Monies arising under a will, and paid by the executors into Court in a creditor's suit, *held* legal assets.

The proceeds of real estate directed by the Court to be sold for payment of debts, and paid by the purchaser into Court, *held* legal assets. *Lovegrove* v. *Cooper*, 271

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A judgment creditor of a beneficed clergyman is prevented by the stat. of Elizabeth from suing in equity to have his judgment made a charge under the stat. 1 & 2 Vict., which makes the judgment have the same effect as a charge in writing.

On motion for a receiver at the suit of an equitable incumbrancer, where another equitable incumbrancer later in date had acquired a legal possession, the Court refused to disturb the possession so acquired, and refused the motion for a receiver. *Bates* v. *Brothers*, 509

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Where value is given for a blank acceptance, the authority to fill it up, being coupled with an interest, is not revoked by death; but where there is no such interest, the authority to fill up and negotiate is terminated by the death of the acceptor.

Giving a blank acceptance is only primâ facie evidence of an authority to the person to whom it is given to fill up the bill for the amount to which the stamp extends; and where the holder of a bill takes it with notice of a circumstance of suspicion, he can be in no better situation than the drawer or indorser, who had given no value for the bill.

The holder of a bill, who, without any express notice of any circumstance of suspicion, took the bill, not in the ordinary course of business and not relying on the security, required evidence of title in the drawer to negotiate the bill, which deceived him, has only his remedy against the drawer personally who deceived him, and he can have no

better title on the bill than the drawer had. *Hatch* v. *Searles: Stanway's case, Conway's case,* 147

## BOOK DEBTS.

On a sale, by the executors, of the book debts of their testator, the debtors to the estate being also creditors, both on trade and also private debts, but claiming no right of set-off:—*Held*, the purchaser entitled only to the balance remaining due, after deducting both trade and private debts due from the testator's estate. *Chick* v. *Blackmore,* 274

## BREACH OF TRUST.

1. A widow, a tenant for life, desiring an increase of income, induced a trustee to invest, out of a trust fund, a sum exceeding two-thirds of its value on mortgage of copyhold house property at interest at 5*l.* per cent. After the rents had become insufficient to pay the interest, her daughter, on her marriage, became entitled to one-fourth of the trust fund. The trustee having stated to the husband and wife the deficiency in the widow's income and its cause, they accepted a small sum of money in hand in lieu of their one fourth, and made no objection for ten years, when the widow died. Becoming then entitled to the remaining three-fourth parts of the fund, they sought by suit to charge the trustee with the deficiency:—*Held*, that they had so far acquiesced in the investment, and could not complain of it.

It is not a breach of trust for a trustee to take a mortgage not containing a power of sale. *Farrar* v. *Barraclough,* 231

*Lapse of Time.*

2. Purchase money proved to have been left in the hands of the purchaser as an indemnity in the year 1796, but for which a receipt was indorsed on the conveyance, the evidence being in the recitals of a deed contemporaneous with the purchase and executed in order to enable the purchase to be completed, and these recitals stating trusts of the fund under which the plaintiffs were entitled in remainder after two life estates, the last of which expired in 1845:—*Held*, that, as the plaintiffs' title in possession did not accrue till 1845, they were entitled, on a bill filed in 1852, to have the trust fund made good out of the assets (real estate) of the purchaser who had died in 1811. *Hawkins* v. *Gardiner,* 441

3. One of three trustees, who was alleged to have participated in a breach of trust, clearly committed by the others, being also executor of a cestui que trust:—*Held*, that a legatee of the cestui que trust was entitled to maintain a bill against the three trustees to recover the funds lost by the breach of trust. *Sandford* v. *Jodrell,* 176

4. A policy of assurance on his own life was effected by a defaulting trustee with the sanction of the Master, on a proposal to compromise a suit for restoring the trust fund; but the trustee died before the Master made his report, or finally approved of the proposal for compromise:—*Held*, that the proceeds of the policy were not general assets of the trustee, but primarily applicable to compensate the loss by the breach of trust. *Ward* v. *Ward,* 125

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*See* WINDING-UP ACTS, 2.

## CHARGE (ON REAL ESTATE).

A., being entitled in fee to real estates, subject to a trust to raise 6000*l.* for B., and, in the event of her death without children, for A., on his marriage, conveyed the estates to the trustees of his marriage settlement, subject to the trust to raise the 6000*l.* on the trusts (in the will creating it) mentioned, and died living B. On B.'s death without children, A.'s representative filed a bill to establish the charge. The Court held that the charge was subsisting, and directed the principal, interest, and costs to be raised by a sale or mortgage of the real estate. *Johnson* v. *Webster*, 136

## CHARGE (OF DEBTS).

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## CHARITY.

The executor and trustee of a residue given for a charity, to be administered with the approbation of the rector and churchwardens, did not communicate the fact of the bequest to them, but held the trust fund in stock in his own name from 1840 till 1852. The rector and churchwardens accidentally heard of the bequest in 1852, and were proceeding to file an information, when the trustee, who admitted possession of the fund, invested it in 3*l.* 5*s.* per cents., and transferred it into Court under the Trustee Relief Act. The Court, holding such conduct to be a gross neglect of duty, repudiated the investment, and charged the defendant with the balances in his hand as cash, with interest at 5*l.* per cent., with annual rests; and refused to allow him his costs up to the hearing.

On appeal the decree was varied as to the interest from the rate of 5*l.* per cent. with rests, to 4*l.* per cent. without rests; and as to costs, by charging the defendant with them up to the hearing. *The Attorney-General* v. *Alford*, 488

## CONFIDENTIAL RELATION.

Where a person, by a deed, eight days before his death, grants a benefit to his grandson and son-in-law, there is no such confidential relation as to induce this Court to presume fraud. *Beanland* v. *Bradley*, 339

## CONSIGNEE.

1. A consignee of West India estates appointed by the Court, discharged at his own request, there being a large balance due to him :— *Held* entitled to be indemnified out of the Slaves Compensation Money (which had been paid into Court and accumulated), for his expenditure and costs, in priority to a mortgagee whose security was prior to the suit, but who was not made a party till after the discharge of such consignee.

A consignee appointed by the Court and expending his money under its sanction, may reasonably look for reimbursement out of every fund arising from the estate under its control.

A consignee of the same West India estates, appointed after the mortgagee had become a party to the suit and the compensation money for the slaves had been paid into Court, a large balance being found due to him : — *Held*, that, while consignee, he could not be repaid out of the fund in Court; but, on his amended petition to be discharged,

and to have the corpus paid to him, the order was made. *Morrison* v. *Morrison*, 564

2. A consignee of West India estates appointed by the Court has a right to be reimbursed his expenditure out of the rents of the English estates of the same owners, although the consignee is not the receiver of these estates. *In the Matter of Tharp*, 578

## CONTRIBUTORIES.

Contributories not all necessarily liable for the costs of winding-up.

*Quære*, whether those who have, before the order to wind-up, paid their full share of subscribed capital are not entitled to recover their costs from those who have not paid. *In re Sea, Fire, and Life Assurance Company; Ex parte Greenwood*, 112

*See* WINDING-UP ACTS, 2.

## CONVERSION (TRUST FOR).

A testator desired his executors to sell, as they might think proper, his business and lease of his house; and to place the money in the funds; and to pay to his wife all rents, dividends, or funded property, and all other rents or interest to which he was entitled, for her use, and for bringing up all his children; and, at her death, all the residue of his estate to be equally divided among his children. The executors were authorised to advance to any child his portion, at his wife's approbation, but not to decrease her income below 100*l.* per annum:—*Held*, that there was no trust for conversion.

The question against the widow was raised by claim, which involved a litigation extending over four years; the same question might have been raised by bill and demurrer. The Court, holding the costs to have been improperly incurred, refused the plaintiff his costs *Marshall* v. *Bremner*, 237

## COPYHOLD (FREE BENCH).

Copyholds surrendered to a purchaser to uses similar to the common uses to bar dower, on which surrender the purchaser was admitted to hold as tenant in fee simple, and continued to hold on that admittance till his death; his devisee is bound by the terms of the admittance, and not entitled to claim as appointee under the surrender, so as to defeat the widow's right to free bench.

*Quære*,—Whether, since the statute 55 Geo. 3, c. 192, the devisee of copyhold estates surrendered to the uses of the will can claim as appointee under the surrender.

The Statute of Dower, 3 & 4 Will. 4, c. 105, does not extend to copyholds.

Copyhold land, purchased by the husband, was surrendered to the use of him and his assigns for life, and, after his decease, to the use of such person, for such estate, and upon such trust as he by any surrender or by will should surrender or devise, and in default of such surrender or devise, and so far as the same, if incomplete, shall not extend, to the use of the husband, his heirs and assigns, for ever, at the will of the lord, &c. The husband was admitted in fee, and by will devised the land to a trustee on trust for sale. By the custom of the manor, the title of the wife could only be destroyed by her voluntary surrender:—*Held*, that she was entitled to her customary dower. *Powdrell* v. *Jones*, 407

## COSTS.

*Crown's Right to.*

An intestate was supposed to have no next of kin; and the Solicitor of the Treasury obtained letters of administration on behalf of the Crown, and recovered the estate, but afterwards a person, proved to be next of kin, procured letters of administration, and a revocation of the administration which had been granted on behalf of the Crown, and then instituted a suit to recover the estate, which was ordered to be paid over to the plaintiff:—*Held*, that the Crown was not entitled to the costs of this suit. *Kane* v. *Maule; Kane* v. *Reynolds*, 331

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## COVENANT.

*Non-execution of, by Covenantee.*

1. An indenture of covenant containing stipulations both on the part of the covenantor and the covenantee, executed by the covenantor and not by the covenantee, who declines to execute it and never acquired the character in respect of which he is made a party as covenantee, cannot be enforced by him against the covenantor. *Carew's case*, 1

*To Produce.*

2. A mortgagee being decreed to reconvey one undivided moiety of an estate included in his security (a part of the debt being satisfied) to the mortgagor, and being entitled to retain the title deeds of the whole estate, is bound to covenant to produce the deeds. *Yates* v. *Plumbe*, 174

*To Repair.*

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*To Settle.*

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## CREDITOR (COSTS OF PROVING DEBT).

1. A person, claiming to be a creditor under a decree to administer the testator's estate, having failed to establish his debt after a long and expensive examination of witnesses, was ordered to pay the costs of the proceedings. *Hatch* v. *Searles*, 147

2. In an administration suit, a creditor's claim was admitted as a claim only by the Master's report, to which the creditor did not except. Shortly afterwards, the result of a suit tended to establish his debt; after more than a year, the creditor petitioned to be admitted as a creditor against the estate:—*Held*, that he might be admitted, without being charged with the costs, which had not been increased by the delay. *Lee* v. *Flood*, 250

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## CROWN'S RIGHT TO COSTS.

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## DEBT (SATISFACTION OF).

A debtor, by deed, assigned his effects for the benefit of his creditors, who thereby covenanted not to sue him. One of these creditors, by will, gave the residue of his estate among six persons, and directed that such of them as should be indebted to him at his decease should accept the debt as part of his share. One of these persons was the debtor:—*Held*, that the debt was satisfied by the assignment and the testator's covenant not to sue; and that the executors were bound to pay to the debtor his full share of the residue. *Golds* v. *Greenfield*, 476

## DECREE.

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Where there was error apparent in the decree and the clerk's certificate, by directing payments out of personal estate instead of apportionment between real and personal estate, the Court altered and corrected the decree and certificate without a rehearing, notwithstanding the 15 & 16 Vict. c. 80, s. 34, and the 51st of the Orders of the 16th of October, 1852. *Cradock* v. *Owen*, 241

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## DENIAL IN AFFIDAVIT.

On a motion to dissolve an injunction (there being no answer) the Court will not dissolve the injunction upon the sole ground that the plaintiff's equity is denied by the defendant's affidavit, where the affidavit did not traverse all the facts on which the plaintiff's equity rested. *Pyecroft* v. *Pyecroft*, 326

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## ELECTION.

A power to lease and manage his

real estate, given by a testator to his trustees, does not, by itself, raise an implication of the testator's intention to exclude his wife from dower, so as to compel her to elect.

In determining the obligation of the widow to elect, the Court will regard the intention of the testator, apparent on the whole of the will.

The amount of the provision made by the will is a material circumstance in indicating the testator's intention. *Warbutton*, v. *Warbutton*, 163

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## EQUITABLE ASSIGNMENT.

A., having obtained a loan from B., gave him the following instrument, addressed to his (A.'s) debtor —"I hereby authorise you to pay B. 365*l.*, being the amount of my contract, B. having advanced me that sum." (Signed) "A."—*Held* a valid equitable assignment, and not requiring a stamp as an order for payment of money under 55 Geo. 3, c. 184. *Diplock* v. *Hammond*, *The Guardians of the Poor of St. Mary's Newington* v. *Hammond*, 141

## EQUITABLE FREEHOLD.

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## EQUITABLE MORTGAGE.

The secretary of a banking company had a credit account with the bank to the extent of 3000*l.*, secured by a memorandum, specifying certain securities deposited by way of equitable mortgage. On his dying a debtor to the bank in 4000*l.*, there was found in his office in the banking house the securities mentioned in the memorandum, with others, tied in a bundle, and indorsed and labeled as securities. There was evidence that he had stated that the bank was secured in 5000*l.*:—*Held*, that the bank was equitable mortgagee of all the securities. *Ferris* v. *Mullins*, 378

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*See* WILL, 10.

## FELONY (ALLEGATION OF).

The clerk to a banking firm, who had misappropriated the money of the firm, died before the fraud was discovered, intestate, leaving considerable property, which was placed by the widow in the custody of the bank. She subsequently obtained administration of his estate, and, to recover the property, commenced proceedings against the bank, who filed their bill for an injunction and administration of the estate. Demurrer by the administratrix, on the ground, that, the bill alleging a felony, no civil remedy lay in respect thereof — overruled. *Wickham* v. *Gatrill*, 353

## FORECLOSURE.

In a foreclosure suit, a trustee, in whom was vested the legal estate in the mortgaged property, and who had agreed to convey it to the plaintiff when required, is a necessary party. *Hichens* v. *Kelly*, 264

*See* SALE, 2.

## FOREIGN COURT (JURISDICTION OF).

*See* INFANT.

## FOREIGNER.

*See* INFANT.
PRACTICE, 6.

## FORFEITURE.

*See* SPECIFIC PERFORMANCE, 4.

## FRAUD.

*See* CONFIDENTIAL RELATION.
FELONY.
UNDUE INFLUENCE.
WILL, 4.

## FREE BENCH.

*See* COPYHOLD.

## GAVELKIND LANDS.

*See* HEIR-AT-LAW.

## GENERAL ASSETS.

*See* BREACH OF TRUST, 4.

## GIFT TO CHARITY.

*See* CHARITY.
WILL, 2, 6.

## GIFT TO WIFE.

*See* HUSBAND AND WIFE, 1.

## GIFT TO CORPORATION.

*See* WILL, 6.

## GUARDIAN.

*See* INFANT.

## HARBOUR DUTIES.

*See* SALE, 1.

## HEIR-AT-LAW.

A testator, seised of lands in common socage and of other lands in gavelkind, desired everything to remain in its then present position during his wife's life, for her use, and, after her decease, devised his real estate to his then male heir and his heirs, in strict tail male:—*Held*, that the lands in gavelkind, as well as those in common socage, passed to the testator's heir at common law. *Thorp* v. *Owen*, 90

*See* POSTHUMOUS CHILD.

## HUSBAND AND WIFE.

1. The dividends of stock purchased during coverture in the name of the wife, out of funds placed at her disposal for family purposes by her husband, then an aged person, were paid into a bank to her account, and by her applied for domestic expenses. The wife dying in the husband's lifetime, in a suit to administer the husband's estate, *held*, that the presumption that the stock was a gift to the wife, arising from the purchase being made in her name, was rebutted by the mode of dealing with the dividends. *Hoyes* v. *Kindersley*, 195

2. A husband and wife, in America, by a deed of separation, agreed to live apart, and that the wife should be at liberty to carry on business, &c., and to retain for her own use

all her present and future property, in any way acquired. Subsequently, a legacy, having accrued in right of the wife, was carried to the account of the husband and wife. Nothing having been heard of the husband for fourteen years, on a petition presented by the wife, asking the transfer to her of the stock, the Court directed the stock to be sold, and the proceeds paid to her on her sole receipt. *Whitlow* v. *Dilworth*, 35

## IDENTIFICATION OF DOCUMENT.

*See* PRACTICE, 4.

## INCUMBRANCE.

*See* BENEFICE.

## INDEMNITY.

*See* SALE AFTER DECREE.

## INFANT.

The order of a foreign court appointing a guardian of an infant, the child of a British subject, will be recognised in this Court with the respect due by the comity of nations to the order of a foreign court, but it does not confer on the appointee the character of guardian in this country. *Re Dawson—Dawson* v. *Jay*, 199

## INJUNCTION.

*See* DENIAL IN AFFIDAVIT.

## INSOLVENCY.

*See* PRIORITY.

## INTERROGATORIES (ENLARGING TIME FOR DELIVERY OF.)

*See* PRACTICE, 2.

## INTERPLEADER.

1. Where the stakeholder alleged that the fund in his hands was less than one of the claimants asserts to be the amount, a bill of interpleader cannot be maintained. Nor where, before it was filed, one of the claimants had informed the stakeholder that he would file a bill to enforce his demand; and did in fact file his bill on the same day with the interpleader bill, making the only other claimant and the stakeholder parties. *Diplock* v. *Hammond*, 141

2. A judgment-creditor assigned the debt, and afterwards became insolvent. The judgment-debtor died, and her executor received notices from three claimants, one from the assignee of the debt, another from the assignee of the judgment-creditor in insolvency, and a third from the attorney of the judgment-creditor in respect of his lien for costs; the executor thereupon filed his bill of interpleader:—*Held*, on the authority of ——— v. *Bolton*, that the bill could be sustained. *Jones* v. *Thomas*, 186

## INVESTMENT.

*See* RAILWAY COMPANY, 1.

## JUDGMENT AGAINST EXECUTORS.

In a suit to administer the estate of a testator, judgments obtained against his executors are payable according to their respective dates out of legal assets. *Dollond* v. *Johnson*, 301

## JUDGMENT CREDITOR.

*See* BENEFICE.

## LAND TAX.

*See* RAILWAY COMPANY, 1.

LAPSE OF TIME.
*See* WILL, 10.

LAPSED LEGACY.
*See* WILL, 11.

LEGACY.
*See* ADEMPTION,
WILL, 1, 2, 3, 5, 6, 7.

LEGAL ASSETS.
*See* ASSETS.
JUDGMENT AGAINST EXECUTORS.

LEGATEE DEAD AT DATE OF WILL.
*See* WILL, 11.

LIABILITY OF TRUSTEE.
*See* BREACH OF TRUST, 2, 3.
SEPARATE USE.

LIEN.
*See* EQUITABLE MORTGAGE.
INTERPLEADER, 2.
PARTNERSHIP.

LIMITED LIABILITY.
*See* WINDING-UP ACTS, 2.

MARRIED WOMAN.
*See* HUSBAND AND WIFE.
PRACTICE, 1, 2, 4, 5, 6.
SEPARATE USE.

MISDESCRIPTION.
*See* WILL, 2.

MISTAKE.
*See* SPECIFIC PERFORMANCE, 3.

"MONEY."
*See* WILL, 9.

MORTGAGE.
*See* CHARGE, 1.
EQUITABLE ASSIGNMENT.
EQUITABLE MORTGAGE.
SALE, 1.
UNDUE INFLUENCE.

MORTGAGEE.
*See* COVENANT, 2.

NAME (USE OF).
*See* SOLICITOR.

NATURAL LOVE AND AFFECTION.
*See* UNDUE INFLUENCE, 1.

NEGLECT.
*See* CHARITY.

NOTICE.
*See* SPECIFIC PERFORMANCE, 2.

OFFICIAL ASSIGNEE.
*See* ACCOUNT, 2.

OFFICIAL MANAGER (DUTIES OF).
*See* WINDING-UP ACTS, 2.

OFFICIAL MANAGER ENTITLED TO FAVOURABLE CONSIDERATION, 2.
*See* WINDING-UP ACTS, 2.

ORDERS.
*See* PRACTICE, 2, 3.
16th, 17th, 20th, and 46th ORDER of 7th AUG. 1852. App. iii.

PARTIES.
*See* FORECLOSURE.

## PARTNERSHIP.

*Premium, Return of.*

Two surgeons, in consideration of 900*l.* paid by one to the other, entered into partnership for seven years. Before the expiration of a year and a half, the partner who had received the 900*l.* became bankrupt. On a bill by the solvent partner against the bankrupt's assignee :—*Held*, that the consideration for which the 900*l.* had been paid having failed, the plaintiff was entitled to an allowance of a sum proportionate to the period of the partnership which remained, with a lien for that amount on the partnership assets.

Notwithstanding the Bankrupt Act, 1849, s. 152, a receiver was appointed on the motion of the solvent partner.

*Semble*,—that an assignee of a bankrupt partner, who, by giving notice to the debtors to the partnership, prevents the payment of the debts to the solvent partner, who is answerable for the partnership debts, and thus gives occasion to a suit by the solvent partner, is liable to the costs of the suit. *Freeland* v. *Stansfeld*, 479

*See* SPECIALTY DEBT, 1.
TRUSTEE, 2.

## PAYMENT.

Sixteen years after a decree for the administration of a testator's estate under which the amount in the hands of the executors had been paid into Court, and the decree not further prosecuted, the residuary legatees, being infants, on attaining twenty-one petitioned to have the fund paid out to them, according to the trusts of the will; and upon the affidavit of the executors, that there were no outstanding demands upon the estate, the Court ordered the amount to be paid to the petitioners. *Harrison* v. *Lane*, 249

## POLICY OF ASSURANCE.

*See* BREACH OF TRUST, 4.

## POSTHUMOUS CHILD.

*Mesne Rents and Profits.*

A. being seised of real estate died, leaving his sisters his presumptive co-heirs, his wife being enceinte of a son, born subsequently. The rents, from the ancestor's death, remaining unreceived by the co-heirs :—*Held*, that their seisin being gone on the birth of the posthumous child, they were not entitled to so much of the intermediate rents as they had not received before the birth of the heir. *Goodale* v. *Gawthorne*, 375

## POWER.

*See* APPOINTMENT, 1, 2.

## POWER OF SALE.

*See* BREACH OF TRUST, 1.

## PRACTICE.

1. A trustee having refused to convey certain shares to new trustees duly appointed, a notice was served upon him under the 24th section of the Trustee Act, 1850; and, on a petition being afterwards presented, which was not served on the recusant trustee, the Court made a vesting order. *In the Matter of the Trusts of the Will of David Baxter*, App. v

2. The time within which the interrogatories ought to be delivered under the 17th Order of 7th August, 1852, having expired, the Court, under the 20th Order, upon a motion, of which notice was given, enlarged the time within which such interrogatories should be delivered. *Empson* v. *Bowley*, App. ii

3. Where Bank Stock is transferred to the Accountant-General, with a direction to pay the dividends to the tenant for life only, a percentage off the dividends is deducted, unless otherwise ordered by the Court. *Dale* v. *Hayes*, App. vii

4. It is not enough to identify a document, that it should be inseparably connected with, and referred to as so connected in, the affidavit. The document must be impressed with some mark to which the affidavit refers. *Hewetson* v. *Todhunter*, App. ii

5. In a bill filed by a married woman to administer the estate of a testator, and to establish her equity to a settlement, to which her husband and his assignees in bankruptcy were made defendants, the Court *held* the husband was entitled to his costs, but refused to give the assignees their costs. *Rotherham* v. *Battson*, App. viii

6. On a motion that a fund standing to the separate account of a married woman, a foreigner, domiciled abroad, should be paid to her husband, upon affidavit that there was no settlement, and that, by the law of the country where the parties were domiciled, the husband was entitled to the fund, the Court refused to make the order without the consent of the wife taken by commission or on examination. *Schwabacher* v. *Becker*, App. iv

7. The Court, having ordered certain small leaseholds to be sold and the proceeds distributed, together with a fund in Court, among numerous parties upon the certificate of the Chief Clerk, in order to save expense, directed the purchasers to be served with a summons to shew cause at Chambers why the proceeds should not be distributed pursuant to the order; and no cause having been shewn, the proceeds were distributed by the Chief Clerk. *Thorp* v. *Owen*, App. i

8. A petition by the tenant for life of a fund paid into Court by a Railway Company, praying for the investment of the fund, and payment of the dividends to the petitioner; certain persons entitled to a charge on the real estate, in respect of which the fund was paid, being served with the petition and appearing, the Court refused to direct the Railway Company to pay their costs. *In the matter of the Settled Estates of Sir G. Webster, deceased, The South Eastern Railway Act, and the Lands Clauses Consolidation Act*, App. vi

## PREMIUM.

*See* PARTNERSHIP.

## PRESUMPTION OF DEATH.

*When Rebutted.*

The presumption of death, after seven years absence, does not arise, where the probability of intelligence is rebutted by circumstances. *Bowden* v. *Henderson*, 360

*See* HUSBAND AND WIFE, 2.

## PRESUMPTIVE GIFT.

*See* HUSBAND AND WIFE, 1.

## PRIORITY.

The eldest son of a tenant in tail male in remainder, of money land, subject to the life estate of a tenant for life, obtained in 1842 the benefit of the Insolvent Debtors Act; and under the 37th section of that Act, the usual vesting order was made, and he gave the usual warrant of attorney to confess judgment. The insolvent became tenant in tail in possession in 1853, and executed a dis-

entailing assurance; and, for valuable consideration vested the fund in trustees for himself for life, with remainders over. Judgment on the warrant of attorney was not entered up until after the date of this settlement:—*Held*, that the title under the settlement had priority to that of the assignee in the insolvency. *Hawker* v. *Hallewell, Ex parte Sturgis*, 498

PURCHASE.

*See* RULE IN SHELLEY'S CASE.

PURCHASER.

*See* COPYHOLD.
SPECIFIC PERFORMANCE, 1, 2, 3, 4, 5.

RAILWAY COMPANY.

*Costs of Investment.*

1. The costs of investing money paid in by a railway company as the price of land taken under their Act, (in redemption of the land tax on other parts of the same property):—*Held* payable by the company, although not mentioned specifically in sect 80 of the Lands Clauses Consolidation Act. *Ex parte Beddoes, In the Matter of the Shrewsbury and Hereford Railway Act*, 1846, 466

*Provisional Registration.*

2. The subscribers' agreement of a provisionally registered joint-stock company, being by indenture tripartite, and containing a covenant by the allottees of shares, who were named as parties of the first part, to indemnify the managing directors, who were all particularly named or described as parties of the third, the deed being only executed by the parties of the first part, and never executed by any of the covenantees who were the parties of the third part, and the company never having been formed:—*Held*, that the deed was not operative as a covenant of indemnity in favour of the parties who never executed the deed, and who never acquired the character in respect of which they were made covenantees. *In the Matter of the Dover, Hastings, and Brighton Junction Railway Company, and the Joint-stock Companies Winding-up Acts*, 1848 *and* 1849: *Carew's case*, 1

*See* PRACTICE, 8.

READY MONEY.

*See* WILL, 3.

RECEIPT.

*See* ASSETS, 1.
SPECIFIC PERFORMANCE, 5.

RECEIVER.

*See* BENEFICE.

REDEMPTION OF LAND TAX.

*See* RAILWAY COMPANY, 1.

REFUSAL OF TRUSTEE TO CONVEY.

*See* PRACTICE, 1.

REMAINDER-MAN.

*See* TENANT PUR AUTRE VIE.

RENTS AND PROFITS (MESNE).

*See* POSTHUMOUS CHILD.

RULE IN SHELLEY'S CASE.

Devise of real estate to G. H., testator's eldest son, for ninety-nine years, if he should so long live; remainder to trustees and their heirs

for G. H.'s life, in trust to support contingent remainders; remainder to the heirs of the body of his said son; and, for want of such issue, remainder to his second son, for ninety-nine years, &c. By a codicil, the testator devised his real estate to trustees in trust for sale:—*Held*, that the heirs of the body of G. H. took by purchase, and that no equitable freehold resulted to G. H. so as to attract the operation of the rule in *Shelley's case*, and create an estate tail in him. *Coape* v. *Arnold; Arnold* v. *Coape*, 311

## SALE.

1. A harbour company having granted several mortgages of the harbour and buildings, rates, and duties under their Act, afterwards applied to the Exchequer Loan Commissioners for an advance. The Commissioners advanced money upon a mortgage of the harbour and duties, the prior mortgagees in a memorandum of the same date conceding to the Commissioners a qualified priority as to the rates and duties only, without any mention of the buildings. The principal and interest being in arrear, the Commissioners, under their Acts, took possession, and subsequently sold the whole property of the Harbour Company, including the buildings and harbour, to the defendants. Upon a bill filed by a prior mortgagee, who had signed the memorandum:—*Held*, that the purchasers took subject to the rights of the plaintiff, except so far as they were varied by the memorandum. *Jortin* v. *The South Eastern Railway Company*, 48

*After Decree.*

2. Under the 15 & 16 Vict. c. 86, s. 48, the Court has power, after decree for foreclosure, to direct a sale.

On the petition of an insolvent mortgagor and two of his creditors, with the concurrence of the plaintiff (the first incumbrancer), the Court, after a decree in a foreclosure suit, and upon payment into Court of a sum sufficient to indemnify a puisne incumbrancer, made an order for a sale. *Laslett* v. *Cliffe*, 278

## SEISIN.

*See* Posthumous Child.
Rule in Shelley's Case.

## SEPARATE ACCOUNT.

*See* Practice, 6.

## SEPARATE USE.

A married woman, with an absolute power of appointment over property settled to her separate use, having, by her acts, induced the trustees to lend the fund on unauthorised security, so that it was lost, and conceiving herself unable to maintain a suit to charge the trustees for the loss, executed an appointment of the fund after it had been lost, in favour of her infant children, to enable them to file a bill to charge the trustees: the Court dismissed the bill. *Brewer* v. *Swirles*, 219

## SEPARATION.

*See* Husband and Wife, 2.

## SEQUESTRATION.

*See* Writ of Sequestration.

## SET-OFF.

As to the equity of set-off for partnership debts paid by a continuing partner, against a legal debt due from him to a retired partner, upon a bond for a private loan.

One of two partners, as bankers, lent to his partner a sum of money on the joint and several bond and covenant of the borrower and another person, in 1821, and died in 1833; the obligor continued to pay interest till 1843, when he died, and his executor paid interest up to 1847. On the death of the obligee in 1833, some settlement of the banking affairs was come to between his executor and the surviving partner and another subsequently admitted, which the executor alleged was final, but which was disputed. The executor of the obligee then became a partner, and other changes subsequently took place in the firm, each new firm taking on itself all the former liabilities and assets. In 1847, the firm in which the executor had continued a partner became bankrupt.

In a suit for the administration of the estate of the obligor, certain creditors of the firm, on promissory notes given prior to 1833, whose debts had been adopted by the successive firms, were admitted as separate creditors of his estate. The executor of the obligee was admitted as a creditor for the loan, and no equitable set-off for contribution was allowed, none having been established in respect of the said estate of the obligee being separately liable to the creditors, although it was probable, that, in winding up the partnership affairs, some claim by the obligor's estate against the estate of the obligee might be established. *Lee* v. *Flood; Ex parte Lott*, 250

*See* Book Debts.
Husband and Wife, 2.
Wife's Equity to Settlement.

## SETTLEMENT.

*See* Appointment, 1.
Specialty Debt, 2.

## SOLICITOR.

*Summary Jurisdiction over, personal only.*

Where a client had corresponded and dealt exclusively with one only out of a partnership of three solicitors, and remitted a sum of money to that one alone, although desired by him to remit the money to the firm, a motion against all three partners, under the summary jurisdiction of the Court, to compel them to pay the money, refused as to the two partners who had thus been excluded from the fair means of the knowledge of the remittance.

The summary jurisdiction of the Court over its officers extends to relief only in cases of personal misconduct and neglect of duty.

A solicitor, who allows his name to be used by others conducting in his name the business of solicitors incurs the peril of personal responsibility. *In re Lawrence, Crowdy, and Bowlby; Ex parte Burdon*, 367

*See* Account, 1.
Charity,
Trustee, 2.

## SPECIALTY DEBT.

1. Articles of partnership under seal, containing the usual covenant by the partners to be true and just to each other in all their dealings, and by which each bound himself, his executors, &c. unto the other, his executors, &c. in the penal sum of 5000*l.* for the due performance of the partnership articles—on the death of one partner, he was found indebted to the partnership in 11,064*l.*: —*Held*, that the debt was by specialty for 5000*l.* only, there being no covenant or obligation in the deed for payment of the general balance on the settlement of the partnership accounts, but only for 5000*l.*; the

express contract for a definite sum excluding any implication for a larger sum as a specialty debt. *Powdrell* v. *Jones*, 305

2. By a settlement made on his marriage, the settlor covenanted with trustees to settle estate A. upon his wife, but did not. He subsequently exchanged estate A. for estate B. and 1050*l.*, and died insolvent. In a suit by a creditor to administer his estate, the Court declared that estate B. and the 1050*l.* ought to be taken in substitution for A.: — *Held*, that the 1050*l.* was a debt by specialty under the covenant. *Powdrell* v. *Jones*, 335

## SPECIFIC PERFORMANCE.

1. It is no defence to a suit for specific performance against trustees of a turnpike road, that the land they have contracted to sell is liable to pre-emption by the owner of the adjoining land under the General Turnpike Act, 3 Geo. 4, c. 126, s. 39: even where the offer required has not, through inadvertence, been made to such owner, and it is in evidence that the owner insists on his right, the purchaser making no objection to the title, and being content to take such estate as the trustees could convey. *Barrett* v. *Ring*, 43

2. Conditions upon the sale of a reversion subject to a life estate referred to a deed containing a recital, that an annuity was charged on the reversion, but alleged that the annuity had not been claimed for twenty years, and provided that a recital in a deed dated in 1841, that it had not been claimed for eight years, should be conclusive evidence that the annuity had determined. Upon inquiry, the purchaser ascertained that the annuity was still subsisting :—*Held*, that the representation was calculated to prevent the inquiry on which the notice of the deed might have put the purchaser; and the vendor's bill for specific performance was dismissed. *Drysdale* v. *Mace*, 225

3. A lessor, being in possession of a lease of certain messuages, granted an under-lease of one (No. 7) to A., who subsequently assigned it to B. The lessor by his will demised the leaseholds to trustees, who, under an order of the Court, sold inter alia No. 7 to a purchaser, in the particulars of sale No. 7 being described as leased to A. On investigating the title, it appeared that the parcels set out in the underlease to A. were, by a clerical mistake, the parcels of No. 6. The trustees, after the sale, obtained an order of the Court to correct this mistake, by authorising an assignment to the tenant of No. 6, and a new underlease, with proper parcels, to the tenant of No. 7; and the Court overruled an objection to the title by the purchaser of No. 7, and compelled him to complete his purchase. *Grissell* v. *Peto*, 39

*Covenant to Repair.*

4. Agreement to grant a lease of copyhold premises for twenty-one years, and to put the same in repair, there being no evidence that to grant such lease would work a forfeiture, or that the license of the lord could not be obtained:—*Decreed* to be specifically performed.

Though the Court will not ordinarily decree specific performance of an agreement to repair, it is the habit of the Court to decree specific performance of agreements involving the execution of leases, or other instruments containing covenants to repair. *Paxton* v. *Newton*, 437

5. A bill for specific performance stated the terms of the agreement for sale of real estate by private contract,

reduced into writing, but not signed by the defendant himself, who had, however, paid his deposit to the person employed as auctioneer, who signed a receipt referring to the fair copy to be prepared for signature from the rough unsigned memorandum:—*Held*, that the signature by the auctioneer of this receipt, which thus referred to a document which shewed what the agreement was, took the case out of the operation of the Statute of Frauds.

The auctioneer employed to sell on behalf of the vendor, who signs a receipt for the deposit to the purchaser who pays it, acts as agent of both parties; and if the receipt refers to a writing containing the terms of the agreement, the purchaser cannot avail himself of the Statute of Frauds. *Wood* v. *Midgley*, 115

## STAMP.

*See* EQUITABLE ASSIGNMENT.

## STATUTES.


6 ANN. c. 18 . . . 46
47 GEO. 3, c. 11 . . . 48
55 GEO. 3, c. 184 . . . 141
53 GEO. 3, c. 192 . . . 407
3 GEO. 4, c. 126 . . . 43
3 & 4 WILL 4, c. 105 . . 407
7 WILL. 4 & 1 VICT. c. 26 . 458
7 & 8 VICT. c. 110 . . 95
8 & 9 VICT. c. 18 (Lands Clauses Consolidation Act) 466
——— c. 43 587
11 & 12 VICT. c. 45 . . 87
12 & 13 VICT. c. 106 (Bankrupt Act, 1849) . . 479
13 & 14 VICT. c. 65 . . 387
15 & 16 VICT. c. 80 . . 241
——— c. 86 . . 287
TRUSTEE ACT, 1850 . App. v.
SHREWSBURY AND HEREFORD ACT (1846) . . . 466
WINDING-UP ACTS, 1848, 1849 1


## STATUTE OF FRAUDS.

*See* SPECIFIC PERFORMANCE, 5.

## SUBSCRIBERS AGREEMENT (NON-EXECUTION OF).

*See* RAILWAY COMPANY, 2.

## SUMMARY JURISDICTION.

*See* SOLICITOR.

## SURPLUS.

*See* APPORTIONMENT.

## TENANT PUR AUTRE VIE.

There being no satisfactory proof that the persons were living for whose lives certain hereditaments were held, the Court, on the application of the remainderman, made an order under the 6 Anne, c. 18, s. 1, requiring the tenant pur autre vie to produce the persons in question at a time and place specified in the order. *In the Matter of Clossey*, 46

## TITLE (INVESTIGATION OF) WAIVED.

Under an agreement for a lease the intended lessee took possession immediately and before the day fixed by the agreement, which contained no stipulation as to the delivery of an abstract of the lessor's title, and no abstract was called for until after the intended lessee had been four months in possession, and advertised the property to be let as his own:—*Held*, that the right to investigate the lessor's title was waived and lost.

Distinction drawn between cases in which the times for taking possession and delivering the abstract of the title are both fixed by the contract, and a case where the time of taking possession only is fixed. *Simpson* v. *Sadd*, 469

## TITLE DEEDS.

*See* COVENANT TO PRODUCE, 1.
EQUITABLE MORTGAGE.

## TRAVELLING EXPENSES.

*See* WINDING-UP ACTS, 3.

## TRUSTEES.

1. Where three trustees were named in a settlement, with a power to the cestui que trusts to nominate, substitute, or appoint any person or persons in the place of the said present or other trustee or trustees, who should die, &c.:—*Held*, that an appointment of two persons only in the room of the three original trustees, was a valid appointment. *In the Matter of Pool Bathurst's Estate, and the South Wales Railway Co.*, 169

*Trustee Solicitor* (*Costs of.*)

2. An executrix employed her co-trustee under the will and his partners, as solicitors, to transact the necessary legal business of the trust:—*Held* (with reluctance), on the authority of *Lincoln* v. *Windsor* (9 Hare,) that the solicitors were entitled only to costs out of pocket.

*Semble*, in such a case, on the principle of *Cradock* v. *Piper* (1 Mac. & G.), that the solicitors are entitled to their fair professional remuneration.

*Aliter* in the case of a sole trustee or executor being a solicitor and employing himself. *Broughton* v. *Broughton; Broughton* v. *White*, 422

3. *Semble*, where a solicitor, being trustee, is employed by his co-trustee to transact professional business necessary in the execution of the trust, he is entitled to his costs; especially if the business be transacted by a firm of which he is a partner. *S. C.* 433

*See* PRACTICE, 1.

## UNDUE INFLUENCE.

A son, entitled in remainder to real estate expectant on the lives of his mother and father, by whom he was maintained, a few days after he attained twenty-one, in order to relieve his parents, who had mortgaged their life interest as a security for monies borrowed and partly expended in improving the property, from keeping on foot certain life policies, executed a deed charging the inheritance with the mortgage debt, but subsequently filed a bill claiming to have the deeds cancelled on the ground of fraud, which was disproved, and of undue influence;—bill dismissed with costs.

The reported decision in *Field* v. *Evans*, 15 Sim. 375, ascertained to be erroneous. *Baker* v. *Bradley*, 531

*See* CONFIDENTIAL RELATION.

## USES TO BAR DOWER.

*See* COPYHOLD.

## VESTED INTEREST.

*See* WILL, 7.

## VESTING ORDER.

*See* PRACTICE, 1.
PRIORITY.

## VOLUNTARY ASSIGNMENT.

A voluntary assignment by deed of an equitable reversionary interest in personal property is valid.

The assignment by deed of an equitable reversionary interest in personal property, is not to be treated as a mere agreement; and, although it be voluntary, is not an incomplete gift, but is a transfer of the beneficial interest of the assignor. *Voyle* v. *Hughes*, 18

## VOLUNTARY SETTLEMENT.

*See* APPOINTMENT, 1.

## WAIVER.

*See* TITLE.

## WARRANT OF ATTORNEY.

*See* PRIORITY.

## WIFE'S EQUITY TO SETTLEMENT.

A testator, having lent to J. M. 200*l.*, bequeathed 500*l.* to J. M.'s wife. The loan not having been repaid, the Court directed one moiety of the legacy, principal and interest, to be invested and settled on the wife and her children, and the debt due to the testator's estate to be set off against the remaining moiety, and the surplus to be paid to the husband.

The wife's equity to a settlement is paramount to any right in the executor to have a debt due to the testator by her husband set off against a legacy to the wife, out of which she is entitled to a settlement. *M'Cormick* v. *Garnett*, 37

*Against her Husband.*

*See* PRACTICE, 6.

*Against Assignees in Bankruptcy.*

*See* PRACTICE, 5.

## WILL.

*Vested Interest.*

1. A testator, having given certain annuities, gave his real and personal estate to trustees, on trust to pay them; and, from and after the decease of the last survivor but one of the said several annuitants, his children and grandchildren, upon trust to sell the same, and to render the residue of his estate into money, and to divide the same among the said survivor whose annuity shall then cease, and all and every his grandchildren who should be living, if any should be born after the date of his will, and the children of such of his grandchildren, either the said annuitants or born after the date of his will, as tenants in common, except only that the child of any grandchild who should survive its parent should take its parent's share. The children being all dead, and two annuitants living:—*Held*, a great grandson of the testator took a vested interest. *Bellamy* v. *Hill*, 328

*Ambiguity.*

2. A testatrix bequeathed 200*l.* to the Benevolent Institution for delivering poor married women at their own habitations. Ten years previously to the date of the will a society bearing that title, of which she had been a member, had ceased to act; but at the date of the will there was, and had been long existing, a society, called "The Royal Maternity Society for delivering poor married women at their own habitations:"—*Held*, that this society answered the description in the will, and was entitled to the legacy. *Coldwell* v. *Holme*, 31

*Ready Money.*

3. A testator sold lands, and left 900*l.*, the purchase-money, in the hands of his agent, a land surveyor, to be invested on security; the agent died, as was supposed, insolvent, without having invested the money. The testator then, by his will, gave to his wife all his ready money and securities for money, money in the funds, and money in the bank or banks (if any), due or owing to him at the time of his decease:—*Held*, that the 900*l.* passed; and the rather because there was no gift of any residue, so that on the whole will there appeared an intention that all his property should pass, and that the words he had used should include everything, there being no other assets. *Cooke* v. *Wagster*, 296

*Bill to impeach.*

4. Bill by one of the next of kin against the executors and one of the legatees in a will fraudulently obtained by them from a person of unsound mind, praying for an account, and for an injunction and receiver pending a suit in the Ecclesiastical Court to recall the probate: —*Held*, maintainable in this Court, and demurrer for want of equity overruled. *Dimes* v. *Steinberg*, 75

*Legacies, Charge on Real Estate.*

5. A testatrix, by her will, gave her real and personal estate to executors, with a direction to convert her personal estate into money, and to pay thereout her debts, and a pecuniary legacy to A., and to hold the entire residue of her estate in trust for her grandchildren. By a codicil, she directed the trustees acting under such will to pay additional legacies. The personal estate proving insufficient for payment of the debts and legacies: —*Held*, that the legacies were a charge on the real estate. *Gallimore* v. *Gill*, 158

*Gift to Corporation.*

6. A testator having directed the corporation to erect a small building as a repository for his furniture, books, manuscripts, &c., and to appoint a person to take care of the same, and to renew the lease thereof when necessary, gave the residue of his personal estate to the corporation of Southampton, subject to certain legacies, in trust to employ the annual proceeds as may best promote the study and advancement of the sciences of natural history, astronomy, antiquities, and classical and oriental literature in Southampton, such as by forming a public library, botanic garden, observatory, and collection of objects in connection with the above sciences; such garden and library to be kept on his leasehold premises:—*Held*, a valid bequest under the 8 & 9 Vict. c. 43.

It is the duty of the Court, where it finds the Legislature intends to legalise the dedication of property to laudable public purposes, to construe the Act so as to enlarge rather than limit its operation. *Harrison* v. *The Corporation of Southampton*, 387

*Vesting, (Time of).*

7. A testator directed the proceeds of his real estate to be invested in stock, upon trust, to pay the dividends to his two daughters, in equal shares, during their natural lives; and, "from and after their decease, to go to their respective children for their support and maintenance, until they shall attain the age of twenty-two years severally, they to receive the principal and interest as they attain such age, in equal shares;" should either die before twenty-two, the shares of either of them so dying before the attainment of such age to be equally divided among the survivors or survivor of them:—*Held*, that the children took vested interests.

The devesting clause was held to be void. *Hobbs* v. *Parsons*, 212

*Description sufficient.*

8. A testator, having a vested estate under the will of his grandfather, subject to a life estate in his grandfather's daughter Mary, excepted from the operation of his will the real and personal estate which he might derive from his aunt Mary or any of her family:—*Held*, a sufficient description of his vested interest under his grandfather's will. *James* v. *Lord Wynford*, 350

9. A will contained an absolute specific bequest to an individual, and

a limited gift of the residue to the same individual; the Court, seeing that the absolute specific bequest and the general bequest contained each a distinct and specific subject and object of gift—*Held*, that there was an absolute specific bequest, and a limited gift of the residue.

A testator, the keeper of a tavern and betting-house, died possessed of 2049*l.*, the balance of his current account at his bankers; he was then also entitled to 2500*l.* on deposit notes of his bankers, bearing interest, payable on presentation; and he had deposited 6000*l.* with two stakeholders on a bet, which, by the rule of betting, was terminated by his death: — *Held*, that these three amounts passed specifically by his will, under the denomination of "moneys."

A testator was the keeper of a tavern, fully furnished as such, in which he occasionally, but very rarely, slept; he had also household furniture at his private dwelling-house, remote from the tavern, in which he resided and usually slept: —*Held*, that, though the furniture at the tavern might have formed part of the testator's stock in trade, yet, the furniture there, as well as that in the dwelling-house, passed under the gift of "household furniture." *Manning* v. *Purcell*, 284

*Exoneration.*

10. Devisee in tail of real estate, claiming to be exonerated out of the descended moiety from a mortgage, filed his bill against the heir more than thirty years after testator's death, and more than twenty years after the heir's title accrued, but within two years after the deficiency of the personal estate had been ascertained under a decree of the Court:—*Held*, that the devisee was entitled to a decree for exoneration against the heir, with costs. *Newhouse* v. *Smith*, 344

*Charge of Debts. Legatee dead at date of Will. Words of Inheritance.*

11. A testator, after directing that all his just debts should be paid by his executors, devised to his eldest son certain houses, subject, nevertheless, to his paying off the mortgage thereon; and then, having devised to his other sons other houses which he had incumbered, and to his daughters certain houses which were free from incumbrance, empowered his executors to receive all rents due to his estate, and to pay his debts, and to use such means as should be necessary for recovering all money due to his estate, and also to grant possession to his devisees, and to reimburse themselves: —*Held*, not a general charge of debts on the whole of the real estate.

Devise by the testator to his eldest son, who had died previously to the date of the will leaving an heir:— *Held*, on the construction of the 33rd section of the Wills Act, that the heir of the devisee was entitled.

Devise by the testator to his three daughters of real estate, with the appurtenances, to hold the same in joint tenancy for their own sole use and benefit in succession, and not subject to the debts or control of their husbands; the same not to be sold or disposed of, but held in succession by his three daughters, with right of survivorship:—*Held*, that the daughters took as joint tenants in fee. *Wisden* v. *Wisden*, 396

*See* ADEMPTION.
DEBT.

## WINDING-UP ACTS.

1. On proceedings under an order to wind up a company under the Winding-up Acts of 1848 and 1849, it appearing that the company had

only been provisionally registered, and never had been formed; and it also appearing that neither allottees of shares who had executed the subscribers' agreement, nor those who had taken a part in the project as members of a provisional committee or committee of management, had ever been so associated as to be liable on any joint undertaking,—the proceedings under the order to wind-up were wholly stayed. *Carew's Case*, 1

2. Where, in a completely registered company, many of the contributories had not paid the amount due on their shares, and the Master had made a call on all the contributories without distinction—the Court discharged the order for a call, and directed the official manager to repay to those contributories who had paid the full amount of their shares all sums received from them under the order.

The official manager is entitled to the most favourable consideration of the Court, where it can be afforded without injustice to other parties.

It is the duty of the official manager to classify the contributories, distinguishing between those who have and those who have not contributed their proportion to the capital of the company.

*Semble*, that, in a company completely registered under the 7 & 8 Vict. c. 110, the deed of settlement limiting the shareholders' liability to the amount of their shares, shareholders who have paid in full are not liable for a call for costs under the Winding-up Act.

Whether, in the same case, shareholders who have paid in full are personally liable for the debts of the company, except under the 66th, 67th, and 68th sections of the statute—*Quære.*

Whether shareholders, who have paid in full for their shares, and have made further payments under an order for a call, are not entitled to recover such excess from those who have not paid for their shares—*Quære. In the Matter of The Sea, Fire, and Life Assurance Company and The Winding-up Acts: Ex parte Greenwood*, 95

*See* CONTRIBUTORIES.

3. A person summoned, under the 63rd sect. of the 11 & 12 Vict. c. 45, as a contributory, to attend before the Master, is entitled to have his travelling expenses tendered to him. *In the Matter of The Northern and Southern Connecting Railway Company, and of the Winding-up Acts: Mercer's Case.* 87

## WORDS OF INHERITANCE.

*See* WILL, 11.

## WRIT OF SEQUESTRATION.

The defendant, a beneficed clerk, having failed to pay to the plaintiff his debt, as ordered by the Court, an attachment was issued against him, to which non est inventus was returned. The ordinary writ of sequestration was then issued, to which it was returned, that the defendant had no lay property; and the Court, on motion, ordered a writ of sequestrari facias de bonis ecclesiasticis to issue, directed to the bishop of the diocese. *Allen* v. *Williams.* 455